

# **Law in 3-Dimensions**

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By:

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## **ABSTRACT**

This project, overall, involves a theory of law as dimensions. Throughout the history of the study of law, many different theoretical paradigms have emerged proffering different and competing ways to answer the question ‘what is law’? Traditionally, many of these paradigms have been at irreconcilable odds with one another. Notwithstanding this seeming reality, the goal of this project was to attempt to take three of the leading paradigms in legal theory and provide a way to explain how each might fit into a single coherent theory of law. I set out to accomplish this by drawing on the field of theoretical physics and that field’s use of spatial dimensions in explaining various physical phenomena. By engaging in a dimensional analysis of law, I found that I was able to place each paradigm within its own dimension with that dimension being defined by a specific element of time, and in doing so much of the conflict between the paradigms came to be ameliorated.

The project has been divided into two main parts. PART I discusses the fundamentals of legal theory (Chapter 1) and the fundamentals of dimensions (Chapter 2). These fundamentals provide a foundation for a dimensional analysis of law which takes place throughout PART II. In Chapter 3, I argue that the three fundamental theses of Positivism coalesce with the 1<sup>st</sup>-dimension of law, which is defined as law as it exists at any one point in time. From there, I argue in Chapter 4 that the 2<sup>nd</sup>-dimension of law, being law as it exists between two points in time (i.e. when cases are adjudicated), is characterized by Pragmatism. I then turn, in Chapter 5, to argue that the 3<sup>rd</sup>-dimension of law, being law as it exists from the very first point in legal time to the ever changing present day, coalesces with the fundamental theses of Naturalism. Ultimately then, I argue that a theory of law as dimensions, through the vantage points of the specific elements of time, provides a more complete account of the nature of law.

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Finally, I thank my colleagues, friends, and family for their support of my academic pursuits over the years, despite my overly ambitious nature. I especially thank my sister, Tania, and my parents, Jim and Dianne, for their emotional and spiritual support. They have always believed in me and helped me do the same.

## **DEDICATION**

I dedicate this project to my parents, Jim and Dianne Toth, whose continual love, patience, and understanding immeasurably supported my study of law and legal theory. Without that support, this project simply would not be.

## LIST OF ABBREVIATIONS

Am J Juris	American Journal of Jurisprudence
Dal J Leg Stud	Dalhousie Journal of Legal Studies
Harv L Rev	Harvard Law Review
Int J Semiot Law	International Journal of the Semiotics of Law
Man LJ	Manitoba Law Journal
MRAT	Multiple Right Answers Thesis
NCT	Necessary (Moral) Connection Thesis
Oxford J Legal Stud	Oxford Journal of Legal Studies
S Cal Law Rev	Southern California Law Review
Va L Rev	Virginia Law Review



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## INTRODUCTION

*Once more unto the breach, dear friends, once more ...*

William Shakespeare  
Henry V, Act III

The words above, written by Shakespeare in Act III of his Henry V, are part and parcel of what is considered one of Shakespeare's greatest speeches. The words are a passionate plea by King Henry V to his soldiers to once again thrust themselves into the foray of war. The words that follow these are eloquent and bring about visions of military zeal and intense struggle. But notwithstanding the intensity of the struggle, it is understood that it was a noble struggle for a noble cause, an analogy I hope holds some weight with the current project. While the analogy is a loose one, and one that admittedly risks edging upon hyperbole, in my view it is an appropriately fitting one in context, especially with respect to dispute and conflict within legal theory and amongst legal theorists. It may be stated that the discipline of legal theory shares a somewhat similar struggle, with legal theorists from all over the world entering the foray of theoretical dispute by jostling, arguing, and advocating zealously their views with respect to the nature of law. Many of these theorists have successfully built upon through expanded reason, and also tore down through formidable critique, the work of other notable and established theorists that came before them. Their projects have brought about enlightenment and progressing clarity, two objectives that any philosophically inclined individual will hold dear. Unfortunately, however, there is a by-product of the foray that is less romantic and even less productive, with that by-product being increased theoretical dissonance.

Now, it is natural that amongst an environment of dispute there will be critique, but when any one critique is unfounded or misplaced, the result is *needless* theoretical dissonance. In fact, entire schools of theoretical thought have been established *via* critique of other schools of thought, even though there may be well placed doubts as to the very critiques that found the new schools. Notwithstanding all that, there remains an important question as to whether the by-product of dissonance is unavoidable, and if it is not, whether it would be of value to engage in a project that aims to rid disciplines such as legal theory and jurisprudence of that dissonance. Or, put another way, would it be of value to attempt a project whose aim it is to reconcile competing theoretical paradigms, by harvesting their merits while at the same time attempting to remedy their deficiencies, in an overall effort to establish a more unified theory of law.

The question of whether the by-product of theoretical dissonance is unavoidable is, I think, simple to answer. No. There is much value in conventional theory and an important tool of conventional theory is critique; however, it is sometimes only once a critique is aired that it attracts additional commentary which proves it to be either sufficiently grounded or ultimately faulty. That said, for the time that the critique is neither grounded nor found faulty, it is possible (and even probable) that it will act as a catalyst for further commentary. That further commentary will catalyze even further commentary, and so on. The result is a body of critique, expanding exponentially, that has potential to blossom into an entire (new) school of thought – a new theoretical paradigm found within the parent theoretical discipline. As foretold, while the new paradigm may be built upon a questionable foundation, this does not detract from the value of the venture. For if/when the foundation is ultimately grounded, the work of the theorists that contributed to the paradigm will be celebrated as useful. But, if it is never, or only briefly, celebrated because the foundation is found to be faulty, the value of the venture will be in the

pursuit itself, i.e. the pursuit of enlightenment and progressing clarity of the discipline in question. So, not only is the by-product of dissonance unavoidable, but it should not be seen as something that is destructive because it is actually a *necessary* by-product of theoretical progress.

The other, somewhat related, question of whether the pursuit of a more unified theory of law is valuable in and of itself is more difficult to answer, and I will leave it to be answered by those who choose to read and critique this project. For it is my overall aim in this project to take steps towards a more unified theory of law by analyzing three of what I consider to be the main theoretical paradigms in legal theory and their natural attachments to what I call time-based dimensions. Perhaps this project will ground a foundation for further work towards a unified theory; perhaps not. In the end, it will be the critiques, if any, that will be telling in this regard.

But before there may be critique, there must first be a project. The overall structure of this project takes the form of five chapters spread over two separate, yet related, parts, with each chapter and part building upon the others towards the culmination of a theory of law as dimensions. I begin in PART I which consists of two chapters. In Chapter 1, I offer a brief outline of the fundamentals of legal theory and the nature of law, keeping my focus squarely on the more conventional theoretical paradigms, those being Positive Law, Natural Law, and Pragmatist theory. I then turn, in Chapter 2, to explain how one may benefit from conceptualizing the nature of law through specific vantage points, which I will describe as law's 'dimensions'. My aim for Chapters 1 and 2 is to lay the foundations for a dimensional analysis of the nature of law, an analysis that will be unpacked in PART II of this project, which consists of Chapters 3 through 5. In Chapter 3, I argue that Positive Law theory best explains the 1<sup>st</sup>-dimension of law, being law as it exists at any one point in time. In Chapter 4, I argue that Pragmatist theory best explains the 2<sup>nd</sup>-dimension of law, being law as it exists while moving

between two points in time. And finally, in Chapter 5, I argue that Natural Law theory best explains the 3<sup>rd</sup>-dimension of law, being law as it exists from the very beginning of law to the ever changing present day.

## **I. Key Themes**

Before moving forward to PART I, more should be said at this point about legal theory, the nature of law, and this project. In particular, it will be useful to outline two key themes that run throughout this project. The first key theme has its roots in perspective. Perspective, in my view, is key to understanding dissonance in legal theory and is a useful tool in helping one understand and more fully grasp the nature of law. So as my arguments throughout this project progress, it is my aim to tease out the importance of perspective as a key underlying theme.

The second key theme that underlies this project is a concept I call the purification process, which is a process grounded in notions of justice and morality. Indeed, this concept is pivotal to understanding the progression of law, and thus two out of the three dimensions of law. This concept, however, and especially its link to morality, must be sufficiently limited in scope and the limits should be defined from the outset of the project. It is not my intent to proffer any sort of in-depth theory of morality or justice *per se*,<sup>1</sup> but instead to draw attention to the concepts, as Rawls would say, at a higher level of abstraction.<sup>2</sup> Therefore, and with this in mind, one should note that any argumentation pertaining to what justice or morality exactly is, including advanced theorizing in this regard, is simply beyond the scope of this project and thus

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<sup>1</sup> For two thought provoking accounts of the nature of justice, see John Rawls, *A Theory of Justice*, revised ed (Cambridge, MA: Harvard University Press, 1999) [Rawls] and Amartya Sen, *The Idea of Justice*, (Cambridge, MA: Harvard University Press, 2009). For a recent and important discussion of morality from one of the most celebrated legal and moral theorists of modern times, see the late Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011).

<sup>2</sup> *Supra* at 10.

best left to be developed elsewhere. That said, I do hope it becomes clear as my arguments progress that any further argumentation pertaining to the concept of justice is not needed in order to fully grasp the power of law as dimensions.

## **II. Three Questions**

To give additional aim to this project and help tease out the power of a theory of law as dimensions, it will also be useful before moving further to posit a few questions that provide some orientation. Over the course of this project, as the theory of law as dimensions is more fully developed, the questions will come to be answered. There are three main questions, each fundamental to legal theory in its own way. Firstly, the main and most important question to ponder is ‘what is law’? For conceptual purposes, this shall be labelled the Primary Question. The Primary Question is one that informs the discipline of legal theory itself. Plainly, it is the overarching question that all general legal theorists hope to assist in answering in some significant way through their various works. In approaching an answer to this question, it is prudent to also consider what theoretical effect the distinction between ‘what law is’ and ‘what law ought to be’ may happen to bear. Or, and more to the point, in answering the Primary Question, it is helpful to posit a subsidiary question, that being whether it is possible to reconcile the distinction between what law is and what law ought to be, and if it is so possible, what effect this might have on the nature of law. This question shall be labelled the Subsidiary Question, as it is subsidiary to the Primary Question. The answer to the Subsidiary Question is ‘yes’ when one (properly) conceptualizes law as the constant and consistent pursuit of what law ought to be. As well, it should be noted that the answer to the Subsidiary Question doubles as the answer to



the Primary Question, i.e. the question ‘what is law’ is most appropriately responded to with the answer that law is the constant and consistent pursuit of what law ought to be.

The second question to ask is whether there is any relationship between laws that are and laws that ought to be, and if there is such a connection, what does it entail? This shall be labelled the Secondary Question. I will argue that there is such a relationship and that it may be explained as follows. Whenever there exists a law that is deficient in some sense, legitimate claims may be made as to what that law ought to be. When and if those claims are heeded, and the law is changed such that the law that ought to be is now the law that is, and also such that no further legitimate claim may be made as to what that law now ought to be, then one may rightfully conclude that the law is pure or just in a moral sense and therefore wholly moral.

Finally, the third question to ask is whether law has any necessary connection to morality, and if so, what that connection entails. For conceptual purposes, this shall be labelled the Tertiary Question, and like the Primary Question, the Tertiary Question has been the concern of much theoretical thought and has resulted in the dispensing of much ink to paper.<sup>3</sup> While some have answered it with ‘yes’ and others with ‘no’, and others still with ‘it depends’, I will argue that the answer to the question when viewing law as dimensions is both yes and no. What will

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<sup>3</sup> See e.g. HLA Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv L Rev 593 [Hart-Positivism], Lon L Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart” (1958) 71 Harv L Rev 630 [Fuller-Fidelity], Tony Honoré, “The Necessary Connection between Law and Morality” (2002) 22 Oxford J Legal Stud 489, and Klaus Faber, “Farewell to ‘Legal Positivism’: The Separation Thesis Unraveling” in Robert P George ed, *The Autonomy of Law: Essays on Legal Positivism* (Oxford, UK: Clarendon Press, 1996). But see John Gardner, *Law as a Leap of Faith*, (Oxford, UK: Oxford University Press, 2012) [Gardner] – in a Chapter based on a previous article which he had written titled “Legal Positivism: 5 ½ Myths” (2001) 46 Am J Juris 199, Gardner beginning at page 48 of his book argues that the thesis that law has no necessary connection to morality is ‘absurd’ and has never been endorsed by any legal philosopher, and he concludes by finding that the claim is one of the 5 ½ myths that individuals have incorrectly attributed to Legal Positivism. That said, he does seem to concede that Hart may have held this view in his early work, although Gardner ultimately argues that this had to be based on a mistaken reading by Hart of Bentham and Austin. Now, while Gardner’s argument in this regard is debatable, mostly because of the way he chooses to frame the no necessary connection thesis, I note that he grounds the argument on the (correct) notion that the ‘paradigm’ of Legal Positivism is simply a thesis *and not* a complete theory of the nature of law. More will be said on this in Chapter 3.

become clear through a dimensional analysis of law is that the nature of law is such that it both does and does not have a necessary connection to morality. This conclusion may be labelled the law/morality paradox, or the Paradox, with the solution to the Paradox being born from a proper understanding of Law as Dimensions.

### **III. Summarizing the Three Questions**

As a summary then, and as a sort of chart that is indicative of what is to come, the three questions and the subsidiary question, and the solutions to those questions including the Paradox which is derived therefrom, take the following forms:

<b>Primary Question:</b>	What is law?
<b>Subsidiary Question:</b>	Can one reconcile the distinction between ‘what law is’ and ‘what law ought to be’?
<b>Solution:</b>	The Subsidiary Question may be answered in the affirmative if one responds to the Primary Question with the answer that law is the constant and consistent pursuit of what law ought to be.

**Secondary Question:** What is the relationship, if any, between a law that ‘is’ and the law that ‘ought to be’?

**Solution:** When a law that ought to be is made to become a law that is, it may be said that the law is now pure or just in a moral sense and that the law is thus wholly moral.

**Tertiary Question:** Does law have a necessary connection to morality, and if so, what is that connection?

**The Paradox:** Law both does and does not have a necessary connection to morality.

**Solution to the Paradox:** Law as Dimensions

Having posited the above questions and having proffered the preliminary and corresponding solutions, it appears that the framework for this project is sufficiently in place. It is thus appropriate to now build upon this introductory framework, beginning with a descriptive analysis of some fundamentals of the nature of law, followed by a dimensional analysis of the same. So with the above resonating, I move to discuss the fundamentals.

## **PART I: FUNDAMENTALS**

## Chapter 1: Fundamentals of Legal Theory and the Nature of Law

I think it would be wise at the commencement of this chapter to proffer the following caution. This chapter is meant only as a very brief introduction to what are considered otherwise detailed and nuanced theoretical paradigms. It follows that the overview given is necessarily generalized and admittedly, at times, somewhat overly simplified. I chose to take this approach partially in the interests of brevity, but also in the hopes that it will act to enhance overall clarity. My aim at this point is not to argue for or against any particular theoretical paradigm, but instead to identify and then generally describe certain theses found amongst the different paradigms that I believe prove especially important for the discussions in subsequent chapters. This is also why I have chosen not to characterize this chapter as an ‘introduction to legal theory’, for such would be somewhat misleading. In truth, a thorough introduction to legal theory and the nature of law has the potential to span an entire book, and perhaps even more than that.<sup>4</sup>

Needless to say then, my goal for this chapter is more modest. I will look to outline some of the more prominent theses within two of what I consider to be the more conventional theoretical paradigms, Positive Law and Natural Law theory, and will then go on to discuss a third theoretical paradigm, Pragmatism, and most prominently pragmatic implications for judicial adjudication. Generally, the theses to be covered and attributed to the three overarching paradigms include the ‘Separation Thesis’, the ‘Social Fact Thesis’, the ‘Necessary (Moral)

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<sup>4</sup> Many books are instructive in this regard. For example, and for a more in-depth summary and analysis of legal theory and the nature of law that spans many different topics and philosophical issues, see Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence & Philosophy of Law* (New York, NY: Oxford University Press, 2002) [Coleman & Shapiro] and James Penner, David Schiff, & Richard Nobles, eds, *Jurisprudence & Legal Theory: Commentary and Materials* (New York, NY: Oxford University Press, 2005) [Penner et al].

Connection Thesis’, the ‘Right Answer Thesis’, the ‘Best Choice Thesis’, and the ‘Multiple Right Answers Thesis’.

## 1.1 Positive Law Theory

Positive Law theory, otherwise known as Legal Positivism or Positivism,<sup>5</sup> is a theoretical paradigm which has roots that go back centuries and content that has been subjected to evolution and clarification over time. Yet regardless of any of the various evolutions and clarifications that may have taken place, Positivism as a whole remains grounded in a number of fundamental theses.<sup>6</sup> For the purposes of this project, three of the theses will prove especially important, and they are known as: the Social Fact Thesis; the Social Source Thesis or Sources Thesis; and the Separation Thesis.<sup>7</sup> While these theses may take on somewhat different forms depending on the sub-category of Positivism, general statements may still be made about them.

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<sup>5</sup> Throughout this project, I use the terms Positive Law Theory, Legal Positivism, and Positivism interchangeably as general terms for the entire Positivist tradition found within legal philosophy. I may also, as needed, qualify these terms depending on the sub-theory that is to be discussed [e.g. Inclusive Positivism or Exclusive Positivism].

<sup>6</sup> Kenneth E Himma, “Inclusive Legal Positivism” in Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence & Philosophy of Law* (New York, NY: Oxford University Press, 2002) [Himma] at 125 (Himma discusses what he considers to be the three foundational “commitments” of legal positivism. He labels each of these three commitments “the Social Fact Thesis, the Conventionality Thesis, and the Separability Thesis”. In defining the three, Himma states, “The Social Fact Thesis asserts that the existence of law is made possible by certain kinds of social fact. The Conventionality Thesis claims that the criteria of validity are conventional in character. The Separability Thesis, at the most general level, denies that there is a necessary overlap between law and morality.” While it may be true that each of the three theses is important to the notion of Legal Positivism, I will only discuss the first and the third because they have immediate application to the discussion below).

<sup>7</sup> There is much writing related to these theses. For an extended discussion in the form of a general overview, see generally *ibid* at 125-165 and Andrei Marmor, “Exclusive Legal Positivism” in Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence & Philosophy of Law* (New York, NY: Oxford University Press, 2002) [Marmor] at 104-124. Other select writings of note include Hart-Positivism *supra* note 3; HLA Hart, *The Concept of Law*, 3rd ed, (Oxford, UK: Oxford University Press, 2012) [Hart-CL] (The third edition of the CL includes a new introduction by Leslie Green who provides, amongst other interesting arguments, a thought provoking update to many of Hart’s claims about the various theses); Gardner *supra* note 3; Joseph Raz, *The Authority of Law*, 2nd ed, (New York, NY: Oxford University Press, 2009) [Raz-Authority].

The Social Fact Thesis holds as a truism that law is readily identified, and in fact may only be identified, based on social fact.<sup>8</sup> The thesis is directly related to the Sources Thesis, which holds, in basic terms, that the criteria for legal validity of any one law is derived from that law's legal source, with that source necessarily being social in nature (for example, the legislature of a legal system or, in common law systems, the judges of that legal system).<sup>9</sup> It follows from the Sources Thesis that when a legal source creates law (for example when a legislature enacts legislation), the resulting new law and its newfound existence is that of social fact, and that law can thus be identified as social fact. The end result being that the Sources Thesis and Social Fact Thesis are interrelated.

The Separation Thesis, in its strongest sense, holds that law and morality are distinct concepts; or put another way, the thesis holds that there need not be any necessary connection between law and morality in order for a valid law to exist.<sup>10</sup> Some additional nuance in this regard will prove useful. Since its beginnings, and in various ways, proponents of Positivism

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<sup>8</sup> See e.g. Raz-*Authority* *supra* note 7 at 37 (In speaking of the Social Fact and Sources Theses, Raz states that, generally speaking, the theses hold that "[w]hat is law and what is not is a matter of social fact..."); cf Marmor *supra* note 7 at 105-116 and Gardner *supra* note 3 at 19-23.

<sup>9</sup> *Ibid.*

<sup>10</sup> See John Austin, *The Province of Jurisprudence Determined*, Wilfred E Rumble, ed, (Cambridge: Cambridge University Press, 1995) at 157 (John Austin, considered to be one of the founders of Legal Positivism, states in a now famous passage that "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation."); see Hart-Positivism *supra* note 4; see Hart-CL *supra* note 7 (In an attempt to define what is meant by the term Legal Positivism, Hart stated that "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so." Furthermore, in the 3<sup>rd</sup> edition of Hart's book, throughout the Postscript, Hart goes into greater detail on his view of the role that moral principles play in law and, more specifically, in adjudication as he makes his attempts at responding to the various criticisms of his work by Ronald Dworkin. It is here that Hart formerly endorses 'soft positivism' and the Incorporation Thesis and, as a result, Inclusive Positivism. For more on Hart's Postscript and, in particular, the Incorporation Thesis and its relation to Hart's jurisprudential approach, see Jules Coleman, "Incorporationism, Conventionality, and the Practical Difference Thesis" in Jules Coleman, ed, *Hart's Postscript: Essays on the Postscript to the Concept of Law* (New York, NY: Oxford University Press, 2001) [Coleman]. For commentary on Hart's Postscript from a variety of different angles, see generally Jules Coleman, ed, *Hart's Postscript: Essays on the Postscript to the Concept of Law* (New York, NY: Oxford University Press, 2001)); But see Gardner *supra* note 3 at 48 and my commentary to note 3.

have engaged with morality and moral reasoning in helping explain various accounts of the nature of law.<sup>11</sup> But what has not changed is that within the Positivist theses there remains a reliance of some sort on the Separation Thesis (e.g. as a necessary corollary to the Social Fact and Sources Thesis), and this reliance renders the thesis foundational to Positivism in general. From this, one can distill some basic and general doctrine attributable to Legal Positivists. Firstly, they believe that the source or pedigree of law is social in nature and that, as a corollary, all laws exist as social fact. Secondly, they believe that morality and/or moral principles do not necessarily act as a source of law.

Now, within the general ambit of Legal Positivism are two main theoretical sub-paradigms, and from one of these emerged a third that is starting to gain significant support. The first sub-category is known as Inclusive Positivism, which has been endorsed by the likes of Jules Coleman, Kenneth Himma, Wil Waluchow, and probably most notably H.L.A. Hart.<sup>12</sup> The second, labeled Exclusive Legal Positivism, has amongst its proponents Andrei Marmor, Scott Shapiro, Joseph Raz, and the most recent holder of the eminent Chair of Jurisprudence at the

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<sup>11</sup> See e.g. Gardner *supra* note 3 at 48 (Again, I will provide commentary on the following passage in Chapter 3, but for now note):

Finally, I come to the jurisprudence student's favourite myth about legal positivism. Apparently legal positivists believe:

(NNC) there is no necessary connection between law and morality.

This thesis is absurd and no legal philosopher of note has ever endorsed it as it stands. After all, there is a necessary connection between law and morality if law and morality are necessarily *alike* in any way. And of course they are. If nothing else, they are necessarily alike in both necessarily comprising some valid norms. But there are many other necessary connections between law and morality on top of this rather insubstantial one, and legal positivists have often taken great pains to assert them. Hobbes, Bentham, Austin, Kelsen, Hart, Raz, and Coleman all rely on at least some more substantial necessary connections between law and morality in explaining various aspects of the nature of law (although they do not all rely on the same ones).

<sup>12</sup> See e.g. Hart-CL *supra* note 7, Coleman *supra* note 10, Himma *supra* note 6, and Wil Waluchow, *Inclusive Legal Positivism*, (Oxford, UK: Oxford University Press, 1994).



University of Oxford, John Gardner.<sup>13</sup> Below, I will begin by discussing certain key aspects of each subset before going on to outline the relatively new sub-paradigm of Exclusive Positivism advanced by Scott Shapiro.<sup>14</sup> Shapiro labels his theory the Law as Plans theory, and I will be most concerned with the Planning Thesis, for this thesis underlies Shapiro's more general theory of Law as Plans.

### 1.1.1 Inclusive Positivism

Inclusive Positivism<sup>15</sup> is a distinct form of Legal Positivism. The main features that distinguish it from Exclusive Positivism are its interpretation of the Separation Thesis and the Sources Thesis. Inclusive Positivists maintain that there is a separation between law and morality, and further maintain that legal norms flow directly from social sources. Nonetheless, their views also allow for an accommodation of morality and moral principles amongst the criteria of validity for legal norms (such as, perhaps, during the adjudication of legal disputes).<sup>16</sup> The end result is that Inclusive Positivism allows for the possibility that the validity of legal norms, at times, may be derived from a moral source such as a moral norm.<sup>17</sup> This concept is more formally referred to as the 'Incorporation Thesis' because it recognizes potential ways<sup>18</sup>

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<sup>13</sup> See e.g. Gardner *supra* note 3, Raz-*Authority supra* note 7, Scott J Shapiro, *Legality*, (Cambridge, MA: Harvard University Press, 2011) [Shapiro-*Legality*], and Marmor *supra* note 7.

<sup>14</sup> Shapiro-*Legality supra*.

<sup>15</sup> I borrow greatly and gratefully from the work of Kenneth Himma and his essay on Inclusive Legal Positivism found in Coleman & Shapiro *supra* note 1: see generally Himma *supra* note 6 at 125-65. Inclusive Legal Positivism is known by a variety of different terms, including Inclusive Positivism, Soft Positivism, and Incorporationism: see Coleman *supra* note 10 at 100.

<sup>16</sup> See Himma *supra* at 136-50.

<sup>17</sup> See *ibid* at 136.

<sup>18</sup> See *ibid* at 136-37 (Himma outlines two ways by which a legal norm's validity may depend upon its moral content, and thus two different versions of the Incorporation Thesis. Firstly, he notes that a system of law could have a 'Sufficiency Component' whereby in order for a legal norm to be valid, it would be sufficient that the legal norm reproduce "the content of some moral principle." Secondly, a legal system could have a 'Necessity Component', whereby in order for a legal norm to be valid it would be necessary for the content of that norm to parallel some moral norm or set of moral norms).

through which morality may be incorporated into the law.<sup>19</sup> Therefore, it may be said that while Inclusive Positivism generally holds that there *may* be an intersection or connection between law and morality on certain occasions (with respect to legal validity), it does not follow that there *must* be an intersection or connection between law and morality on every occasion.<sup>20</sup>

The logic underlying the Incorporation Thesis may be seen as derived from the work of David Hume and, more specifically, an argument he made that I will refer to as ‘Hume’s Law’.<sup>21</sup> Hume stated his law in this way:

In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when all of a sudden I am surprised to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, ‘tis necessary that it should be observed and explained; and at the same time that a reason should be given; for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.<sup>22</sup>

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<sup>19</sup> *Ibid* 136-41.

<sup>20</sup> It might be argued that if a legal system adheres to the Necessity Component (see note 18 above), the Separation Thesis in this system must fail; however, I do not think this is a necessary consequence. Simply because a legal norm must be based on some moral norm does not mean that the legal norm will be moral. Take, for example, the situation where a legal system requires legal norms respecting abortion to be based on moral principles encompassing the right to life. In such a system, the legislature could pass a legal norm requiring the banning of all abortions. Such a legal norm, at least arguably, could be considered immoral in some respects because it violates moral principles of liberty. The converse case would also be true of a legal system that requires its legal norms to comply with moral principles of liberty. If a legal norm is thus passed allowing for abortions, thereby satisfying the liberty principles, it is at least arguable that aspects of this law would be immoral for it would violate the separate moral principles relating to the sanctity of life. Either way, the thought experiment demonstrates that even in a system adopting the Necessity Component, the Inclusive Positivist (and in fact all Positivists) could argue that the Separation Thesis remains unadulterated.

<sup>21</sup> Indeed Richard Hare has characterized it as such: Richard Hare, *The Language of Morals* (New York, NY: Clarendon Press, 1952) at 29, 44.

<sup>22</sup> *A Treatise of Human Nature*, Selby-Bigge, ed, Book III (Oxford, UK: Clarendon Press, 2006) at 469 [Hume] [emphasis original].

Boiled down, Hume is (correctly) asserting that a logical fallacy exists when one attempts to derive an ‘ought’ from an ‘is’. It follows from this notion that simply because it *is* the case that a law does or laws do intersect with morality, it *does not* follow that a law or laws *ought* to always intersect with morality, or indeed that laws do always intersect with morality.<sup>23</sup> It is this last line of reasoning that began to inform the beginnings of Inclusive Positivism, including the views of its founder, H.L.A. Hart, and his arguments pertaining to the Separation Thesis.

#### **1.1.1.1 Hart and Inclusive Positivism**

Hart established some of the foundations of Inclusive Positivism at the 1958 Oliver Wendell Holmes Lecture when he presented his now renowned paper “Positivism and the Separation of Law and Morals”.<sup>24</sup> Through the paper, Hart strongly and influentially argued that there is a necessary *distinction* between what law is and what law ought to be (a point that follows Hume-type logic) and, of specific importance to Inclusive Positivism, he cautioned that this distinction cannot be applied formalistically and/or uniformly to all aspects of the law.<sup>25</sup> Hart supported this argument by introducing, what I will refer to throughout this project as, the ‘Core/Penumbra’ Thesis.<sup>26</sup> In somewhat crude terms, the thesis holds that although it must be accepted that words, and therefore laws, are open textured<sup>27</sup> in nature and therefore potentially indeterminate, words and laws will nevertheless contain both a core of settled meaning as well as a penumbra of alternative meanings.<sup>28</sup> In identifying and understanding the nature of language

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<sup>23</sup> See e.g. Hart-Positivism *supra* note 3 at 606-15.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Neil MacCormick has argued that Hart gleaned the notion of law being open textured in nature from the work of Friedrich Waissman: see Friedrich Waissman, “Verifiability” (1945-1946) Proceedings of the Aristotelian Society, Supplementary Volumes 119 [Waissman].

<sup>28</sup> Hart-Positivism *supra* note 3 at 607.

and thus the nature of laws in this way, Hart was able to further assert that judges apply what the law actually *is* in the vast majority of cases based on an applicable law's core of settled meaning, but that judges will also, when necessary, resort to a rational consideration of what the law *ought to be* when that judge is forced into a law's penumbra of alternative meanings.<sup>29</sup> For Hart, when a judge is so forced, s/he is considering and engaging with "problems of the penumbra".<sup>30</sup>

The above, however, begs the following question: when one is amongst the penumbra of a legal norm, what ought to be? Hart answered this question by arguing that issues as to what the law ought to be are the subject of many different points of view,<sup>31</sup> and of these points of view, only one will be moral in nature. It follows from this that a judge will consider many different points of view when operating within the penumbra, with only one of those views being moral.<sup>32</sup> So in essence, for Hart, when a judge considers what the law ought to be, that judge will need to consider a variety of different 'standards of criticism' that reflect the notion of 'ought'.<sup>33</sup> While one of the standards that a judge may consider is a moral standard, there will be other standards of what the law ought to be that a judge may consider which will not be moral in character.<sup>34</sup> This reasoning not only suggests that the Separation Thesis holds true, but it also provides a way by which a legal norm may be based on moral criteria. This, as I have already outlined, is at the root of the Incorporation Thesis and thus demonstrates why Hart's legal philosophy helped found Inclusive Positivism.

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<sup>29</sup> *Ibid* at 608.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid* at 612-13.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid* at 613 (In discussing the distinction between what law is and what law ought to be, Hart states that "We must, I think, beware of thinking in a too simple-minded fashion about the word 'ought.' This is not because there is no distinction to be made between law as it is and ought to be. Far from it. It is because the distinction should be between what is and what *from many different points of view* ought to be. The word 'ought' merely reflects the presence of some standard of criticism; one of these standards is a moral standard but not all standards are moral." [emphasis added]).

What I have been attempting to demonstrate up to this point is that Inclusive Positivism is accommodating in nature and, of special importance, that it is accommodating to notions and principles of morality, for it recognizes that morality can at times be a valid source of law. Indeed, this sub-paradigm of Positivism does not draw any unyielding lines between law and morality when it comes to validity, though it may still insist upon a separation between, or at least some necessary distinction between, law and morality. Another form of Positivism, however, rests upon such a staunch line being drawn between law and morality with respect to validity. It is that form, Exclusive Positivism, which I now turn to discuss.

### 1.1.2 Exclusive Positivism

Exclusive Positivism<sup>35</sup> departs from Inclusive Positivism in a significant way with respect to both the Sources Thesis and the Separation Thesis. While Inclusive Positivists are willing to accommodate morality and moral principles within a conception of legal validity and a conception of Legal Positivism, Exclusive Positivists are not, and they further believe that it would be logically inconsistent to do so.<sup>36</sup> As Joseph Raz, a key proponent of Exclusive Positivism,<sup>37</sup> notes in discussing the ‘strong’ and ‘weak’ forms of the Sources Thesis (the strong conforming to Exclusive Positivism with weak conforming to Inclusive Positivism):

The difference between the weak and the strong social theses is that the strong one insists, whereas the weak one does not, that the existence and content of every law is *fully* determined by social

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<sup>35</sup> See generally Marmor *supra* note 7 at 104-24 (Marmor does a terrific job of outlining and defending the sub-paradigm of Exclusive Positivism at a general level. As a matter of methodology, he usefully compares and contrasts his own views and arguments with those of Inclusive Positivism).

<sup>36</sup> See e.g. Raz-*Authority supra* note 7 at 46-47 and Marmor *supra* at 104-16.

<sup>37</sup> I should note that labeling Raz an Exclusive Positivist is a generalization that Raz himself does not share, nor does he find useful. Raz’s theories are complex, detailed, and nuanced, and as such any generalization (like all generalizations) carries with it a certain amount of risk. That said, for conceptual purposes with respect to this project, the label is fitting and, in my view, quite useful when taken in context. Therefore, the label will be maintained, though the reader would be wise to note this comment.

sources. On the other hand, the weak thesis, but not the strong one, builds into the law conditions of efficacy and institutionality. The two theses are logically independent.<sup>38</sup>

From this, Raz goes on to defend the strong form of the Sources Thesis and in doing so defends a key component and distinguishing feature of Exclusive Positivism.<sup>39</sup> To make the point more plain, Exclusive Positivism does not allow for the incorporation of morality as a basis for legal validity in a legal system because morality is not a conventional or social source. Indeed, it is a moral source, and Exclusive Positivism holds that law may only flow from social sources. As Andrei Marmor states, for Exclusive Positivism,

[l]egal validity is exhausted by reference to the conventional sources of law: all law is source based, and anything which is not source based is not law. ...the main controversies about legal validity, ... are basically about the relations between law and morality. Exclusive positivism denies, whereas inclusive positivism accepts, that there can be instances where determining what the law is, follow from moral considerations about that which it is there to settle.<sup>40</sup>

In other words, for Exclusive Positivists, law is law and morality is morality, and the two cannot and thus do not cross each other's delimited boundaries when considering the question 'what is law'.

As one may come to notice, the above argument requires a different interpretation of the Separation Thesis as compared to the interpretation endorsed by Inclusive Positivists. Again, for Inclusive Positivists, the Separation Thesis holds that there is no *necessary* connection between law and morality as far as validity is concerned, though there may be some intersections between the two. That said, while Exclusive Positivists do subscribe to this belief, they do so in a *stronger* form. As such, the Separation Thesis as it pertains to Exclusive Positivism is

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<sup>38</sup> Raz-Authority *supra* note 7 at 46-47 [emphasis added].

<sup>39</sup> *Ibid* at 47-52.

<sup>40</sup> Marmor *supra* note 7 at 104.

interpreted as implying that there is no connection between law and morality, full stop, with regards to requirements of legal validity.<sup>41</sup> It may be generally stated then that for Exclusive Positivism, law and morality are distinct and separate concepts.

### **1.1.2.1 Raz, Authority, and Exclusionary/Pre-emptive Reasons**

Joseph Raz is one of the most insightful and important legal and political philosophers of modern times. He has written many books that have profound implications for one's understanding of the nature of law, politics, and political institutions.<sup>42</sup> To help fulfill the purposes of this project, and to help elucidate Exclusive Positivism, it will prove helpful to briefly discuss Raz's conception of authority, including his notion of exclusionary/pre-emptive reasons.<sup>43</sup> His ideas in this regard will also, somewhat indirectly, support the theory of judicial adjudication expounded in Chapter 4.

Authority for Exclusive Positivists is an important concept, for it helps explain how morality is to be removed from consideration with respect to legal validity. For Raz, law claims legitimate authority over its subjects and in doing so pre-empts and aims to exclude any non-legally recognized reasons that may bear on one's considerations of whether or not to conform to a legal directive.<sup>44</sup> When a legal norm exists, it acts as a reason for individuals to conform to it, and also excludes other non-legal reasons, including moral reasons, to not conform to that

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<sup>41</sup> See generally *ibid.*

<sup>42</sup> Raz-*Authority* *supra* note 7; *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, revised ed (New York, NY: Oxford University Press, 1994) [Raz-*Ethics*]; *The Morality of Freedom*, (New York, NY: Oxford University Press, 1986) [Raz-*Morality*]; *Between Authority and Interpretation*, (New York, NY: Oxford University Press, 2009) [Raz-*Interpretation*]; *Practical Reason and Norms*, (New York, NY: Oxford University Press, 1999) [Raz-*Practical*].

<sup>43</sup> For discussions pertaining to authority: see Raz-*Authority* *supra* at 3-28 and Raz-*Ethics* *supra* at 210-37. For discussions pertaining to exclusionary/pre-emptive reasons: see Raz-*Authority* *supra* at 17, 22-23, 26-27, 32-33, Raz-*Practical* *supra* at 35-48, and Raz-*Morality* *supra* at 57-62. Hereinafter I will refer to exclusionary/pre-emptive reasons mostly as pre-emptive as this is what Raz calls them in his most recent works.

<sup>44</sup> Raz-*Authority* *supra* at 28-31; Raz-*Ethics* *supra* at 211-14.

norm.<sup>45</sup> It follows that the very nature of legitimate authority, and more specifically law's claim to it, provides a basis for exclusion of moral criteria with respect to legal validity. It may be said to follow from this then that the concept of authority *reinforces* the Sources Thesis.

Raz notes that when institutions, such as a legislature, give an authoritative directive, such as that one shall not murder another person, the distinguishing feature of such a directive compared to others is that it has a special pre-emptory status.<sup>46</sup> The directive will do two things: firstly, it will reflect (if it is to be legitimate) the dependent reasons of the individual(s) to which it applies; and, secondly, it will act to replace (some of) the reasons of the individual(s) to act.<sup>47</sup> So, for example, if one believes s/he has a reason to murder another, such as because the other severely abused one's daughter, the directive of the legislature precluding the individual from murdering is to replace (i.e. pre-empt) that individual's own reasons to murder. The directive will also reflect some of the individual's dependent reasons, such as, perhaps, that society cannot be orderly unless murder is prohibited. But while Raz argues that one may at times be (morally) justified in not obeying an authoritative directive (if that authority is found to be illegitimate by running afoul of one's dependent reasons), this does not change the fact that from the point of view of the law, its authoritative directive excludes those reasons when considering liability under and pursuant to the law.

Raz argues that the concept of law claiming authority supports the Sources Thesis and results in a rejection of the Incorporation Thesis.<sup>48</sup> He argues that the nature of authority conferred upon an institution is such that it "[l]ends [a] directive its binding force... . [And the same authority] does not extend to what it would have directed, given a chance to do so, nor to

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<sup>45</sup> See *ibid.*

<sup>46</sup> Raz-*Ethics* *supra* note 42 at 212.

<sup>47</sup> See *ibid* at 214.

<sup>48</sup> *Ibid* at 229-31.



all that is entailed by what it has directed.”<sup>49</sup> The idea we can extrapolate from this is that a legal directive is strictly legal because the nature of authority in the legal sense is such that it only confers authority for this type of directive. It is not open to moral directives, or pragmatic directives, although these too may be conferred from authority, just not legal authority. As Raz goes on to state, an implication of the Sources Thesis is that “Moral argument can establish what legal institutions *should* have said or *should* have held but not what they *did* say or hold.”<sup>50</sup> In other words, evaluative arguments about the law do not assist in the identification of what law actually is. This is because it must be remembered that for Raz, a law is a social fact attributable to the workings of the Sources Thesis.<sup>51</sup> In any event, what one may pull from Raz’s arguments as a whole is that it is the limiting nature of authority, limiting in the sense that authority limits the sources of law to that of social sources, that buttresses the Sources Thesis, resulting in an exclusion of morality from considerations of legal validity; and what results from all of this is a sub-paradigm of Positivism known as Exclusive Positivism, whose name resembles the fact that the sub-paradigm operates exclusive of morality with respect to its underlying theses.<sup>52</sup>

#### 1.1.2.2 Shapiro and Law as Plans

Scott Shapiro has recently developed a theory, rooted in Exclusive Positivism, which holds that legal norms are plans and that, consequently, a system of laws is actually an intricate system of plans.<sup>53</sup> The theory is an account of the nature of law and is developed in his book,

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<sup>49</sup> *Ibid* at 229.

<sup>50</sup> *Ibid* at 231.

<sup>51</sup> *Ibid* [emphasis added].

<sup>52</sup> I note for cautionary purposes that this statement might be viewed as somewhat misleading. My argument is not meant to stand for the proposition that moral/evaluative arguments and analysis cannot be undertaken by Positivists; indeed they can. But in doing so, they would venture beyond the theses of Positivism. Support for this view can be found in Gardner *supra* note 3.

<sup>53</sup> Shapiro-*Legality supra* note 13.

*Legality*.<sup>54</sup> The Planning Theory of Law, as he calls it, essentially holds that legal activity (i.e. the exercise of legal authority) “[i]s an activity of social planning.”<sup>55</sup> The end result is the ‘Planning Thesis’, a thesis which holds that legal activity is social planning. Shapiro takes great pains, however, to emphasize and demonstrate that the Planning Thesis is more than a simple notion that legal activity is an activity “[i]n formulating, adopting, repudiating, affecting, and applying norms for members of [a] community.”<sup>56</sup> For him, legal activity is the very activity of planning.<sup>57</sup>

Shapiro’s conception of law as plans is grounded in the idea that law is social in nature, and that because human beings are both social *and* ‘planning creatures’ in nature, human beings create law with the purpose of planning.<sup>58</sup> Planning is required whenever the ‘circumstances of legality’ arise, and such arises whenever a society faces serious moral issues “[w]hose solutions are complex, contentious, or arbitrary.”<sup>59</sup> In the end, a system of (complex) plans that may be called a legal system is created, with the aim of the system being to guide, organize, and monitor behaviour.<sup>60</sup> The fundamental goal of legal planning, according to Shapiro, is to remedy deficiencies inherent to other forms of planning.<sup>61</sup>

Some general examples will help illustrate the point of what is meant by a plan. The first example is what Shapiro calls ‘top-down planning’, which can be the result of legal norms such as legislation. Take for example regulatory schemes, which are usually broad in nature. Such schemes begin with general rules conferred by statute that have their details filled in over time,

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<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid* at 195.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid* at 119.

<sup>59</sup> *Ibid* at 170

<sup>60</sup> *Ibid* at 119, 200.

<sup>61</sup> *Ibid* at 171.

whether by officials within the scheme or judges in cases.<sup>62</sup> These schemes go from broad rules to more narrow and specific rules, thus rendering them ‘top down’ in their planning nature. Take for example the regulation of food and drugs in the United States. The regulatory scheme consists of the Food and Drug Administration, a government organization given broad powers conferred by statute to both regulate and make regulations that guide individual behaviour with respect to certain foods, drugs, medical devices, etc. The organization and officials are tasked with regulating and thus engage in top down planning with respect to that which they regulate.

The second example is that of what Shapiro identifies as ‘bottom-up planning’, which occurs for example in common law systems through the decisions of judges.<sup>63</sup> Because of the ‘political conviction’ that courts are not to engage in broad reaching social planning and are to stick to the more narrow issues that come before them, bottom-up planning is what results. Shapiro uses the example of tort law, whereby in its beginnings there were specific duties imposed on individuals depending on their capacities, relationship to others, etc.<sup>64</sup> Over time, courts broadened the rules of tort liability, eventually settling on the modern rule known as the neighbor principle: that everyone owes a duty of care to their neighbours.<sup>65</sup> Shapiro argues that this *consolidation* of the various tort rules demonstrates bottom-up planning because, in so consolidating, the court advanced the common law one level up the ‘legal planning tree’.<sup>66</sup>

It is prudent to note that even though Shapiro provides a conceptualization of law as plans, he makes clear that it is not his goal to draw any sort of analogy between the concept of

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<sup>62</sup> See *ibid* at 195-97 (Shapiro gives the example of the government in the United States regulating business competition over the years through various pieces of legislation, beginning with the *The Sherman Antitrust Act*, 15 USC (1890), the eventual establishment of the FTC through the *The Clayton Antitrust Act*, 15 USC (1914), and so on).

<sup>63</sup> *Ibid* at 198-200.

<sup>64</sup> *Ibid* at 198

<sup>65</sup> See *ibid* (The modern rule of tort liability arises out of the famous English case of *Donoghue v. Stevenson*, [1932] UKHL 100 *per* Lord Atkin).

<sup>66</sup> *Ibid*.

law on the one hand and the concept of plans on the other, but to instead unravel the inherent implication that laws are plans, and that the nature of law is planning.<sup>67</sup> In his own words, “The existence conditions for law are the same as those for plans because the fundamental rules of legal systems *are* plans. Their function is to structure legal activity so that participants can work together and thereby achieve goods and realize values that would otherwise be unattainable.”<sup>68</sup> It can be gleaned from this that Shapiro’s theory of law, while certainly unique in many ways, ultimately adheres to a methodology familiar to Positivism of being descriptive as opposed to evaluative in nature.

One additional and important highlight should be made with respect to Shapiro’s theory of law as plans. Shapiro’s theory, as he positions it, is inextricably linked to Legal Positivism, and as such maintains that each of the Social Fact Thesis, the Sources Thesis, and the Separation Thesis hold true within the theory. In fact, Shapiro asserts that “[t]he existence of legal authority can only be determined *sociologically*: the question of whether a body has legal power is never one of moral legitimacy; it is a question of whether the relevant officials of that system accept a plan that authorizes and requires deference to that body.”<sup>69</sup> And then, in drawing inspiration from one of the founders of Positivism in general, John Austin, Shapiro asserts that, “[P]ositivism is trivially and uncontroversially true in the case of plans: *the existence of a plan is one thing, its merits or demerits quite another.*”<sup>70</sup> These two quotes together are sufficient to demonstrate that in Shapiro’s view, a conception of law as plans conforms with the three main

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<sup>67</sup> *Ibid* at 119.

<sup>68</sup> *Ibid* [emphasis added]

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid* [emphasis added] (It is readily apparent that Shapiro here is playing off of Austin’s now somewhat iconic assertion that “The existence of law is one thing; its merit or demerit is another.” The statement is considered by some to be a defining one for Legal Positivism and especially the Separation Thesis found within Legal Positivism. In Chapter 3 of *Legality*, Shapiro usefully provides an analysis of Austinian theory, which is also known as the Sanction Theory of Law).

Positivist theses because the adoption and acceptance of plans are done so by social sources that have the legal authority to do so (thus a plan, once adopted, exists as social fact), and once a legal plan exists, questions as to its moral status are independent of its existence as law. In other words, Shapiro may be seen as endorsing the view that the moral status of a legal plan does not and cannot undermine that plan's *legal* validity. Since a conception of plans exists exclusive of morality, it follows that Shapiro endorses Exclusive Positivism.

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Legal Positivism, as outlined above, commits itself to certain theses and in doing so recognizes the same as being foundational to the theoretical paradigm. Historically, many of these theses have come into conflict (somewhat inevitably) with the theses of other theoretical paradigms, and most notably those of Natural Law theory. Because some of the theses native to Natural Law theory prove important for broader discussions that take place within this project, most particularly in Chapter 5, it will be useful at this point to offer a general description of the various theses. So, with this in mind, I turn now to the paradigm of Natural Law theory.

## 1.2 Natural Law Theory

Natural Law theory,<sup>71</sup> which for convenience I will refer to from now on as Naturalism, has deep historical roots, the beginnings of which can be traced as far back as ancient Greece, to the written works of both Plato and Aristotle.<sup>72</sup> Since this time, the Naturalistic tradition has

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<sup>71</sup> For an in-depth overview of both the classical and more modern/contemporary theories of Naturalism, see John Finnis, "Natural Law: The Classical Tradition" in Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence & Philosophy of Law* (New York, NY: Oxford University Press, 2002) [Finnis-Classical] at 1-60 and Brian H Bix, "Natural Law: The Modern Tradition" Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence & Philosophy of Law* (New York, NY: Oxford University Press, 2002) [Bix] at 61-103; see also Penner et al *supra* note 4 at 35-90.

<sup>72</sup> See generally Penner et al *supra* at 38-45 (Nobles and Schiff provide a brief yet informative introduction to the Naturalist tradition); see also Finnis-Classical *supra*.

been built upon and modified through the works of numerous other theorists. These works, in turn, helped shape the overall evolution of the paradigm. Included amongst Naturalism's theorists are the likes of Thomas Aquinas, William Blackstone, Lon Fuller, John Finnis, Ronald Dworkin, and more recently, Mark Murphy.<sup>73</sup> Now, while it could hardly be disputed that Naturalism has undergone change and evolution over time, it remains true that some fundamental tenets of Naturalism, in a general sense, have remained the same. It will be my goal in this section to give a general description of these tenets by referring to certain broad theses of Naturalism, and in doing so will contrast these theses with the most pertinent theses of Legal Positivism. To aid one lexicographically, I shall label the theses of Naturalism to be discussed as the 'Necessary (Moral) Connection' Thesis or NCT, the 'Validity Thesis', and the 'Right Answer Thesis'. Included within this discussion will be brief highlights of an important concept to legal theory in general, the concept of the 'focal meaning' and 'central case' as advanced by Finnis.

### **1.2.1 The Necessary Connection Thesis versus the Separation Thesis**

The first, and somewhat overarching, Naturalist thesis is the NCT. As a preliminary, much like the way by which the Social Fact Thesis is interrelated and dependent upon the Sources Thesis, the NCT is interrelated with the Validity Thesis. In rudimentary terms, NCT may be stated as follows: there is a necessary connection between law and morality (however

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<sup>73</sup> Select and important readings from these theorists include: Thomas Aquinas, *Summa Theologica*, Parts I-III (Notre Dame, IN: Christian Classics, 1981); Sir William Blackstone, *Commentaries on the Laws of England*, (Chicago, IL: University of Chicago Press, 2010); Lon L Fuller, *The Morality of Law*, revised ed, (New Haven, CT: Yale University Press, 1964) [Fuller-Morality] and Lon L Fuller, *The Law in Quest of Itself*, (Boston, MA: Beacon Press, 1966) [Fuller-Quest]; John Finnis, *Natural Law & Natural Rights*, 2nd ed, (Oxford, UK: Oxford University Press, 2011) [Finnis-Natural]; Ronald Dworkin, *Law's Empire*, (Portland, OR: Hart Publishing, 1986) [Dworkin-Empire] and Ronald Dworkin, *Taking Rights Seriously*, (Cambridge, MA: Harvard University Press, 1977, 1978); Mark C Murphy, *Natural Law and Practical Rationality* (Cambridge, UK: Cambridge University Press, 2001) [Murphy-Rationality].

that connection is to be understood), and the necessity of this connection bears on the validity of legal norms.<sup>74</sup> The latter encapsulates the Validity Thesis to be discussed below. What is important at this point, however, is that because of the NCT, the Validity Thesis seems to directly conflict with Positivism's Separation Thesis.

Regardless of the era, the NCT remained central to Naturalism in some sense. That said, conceptions of morality, and as is perhaps more readily apparent, the language by which notions of morality have been presented, has changed over time. Some of the more classical theorists, such as Aquinas, make reference to concepts of 'Divinity' and 'Eternal Law' or 'Divine Law', with such concepts acting as reference points for that which is 'right' or 'good'.<sup>75</sup> These reference points are a sort of gauge by which individuals are supposed to let guide their actions.<sup>76</sup> Other, more contemporary, Naturalists have preferred to adopt language that is more secular in nature, for instance by referring to notions of 'practical reasonableness'<sup>77</sup> or 'practical rationality',<sup>78</sup> when discussing conceptions of morality and the law.<sup>79</sup> But despite any changes in language, each of these Naturalists may still be seen as building upon the basic Thomistic tradition of gleaning a true secular meaning and/or argument that is grounded in more secular philosophy as opposed to pure theological argument. In other words, these theorists, in the spirit of Aquinas, aim to expound secular philosophical argument on topics that had been almost exclusively canvassed through theological argument. In any event, the main point is that

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<sup>74</sup> Mark C Murphy, *Philosophy of Law: the Fundamentals* (Malden, MA: Blackwell Publishing, 2007) [Murphy-Fundamentals] at 36; see generally Dworkin-*Empire supra*, Fuller-*Morality supra*, and Finnis-*Natural supra*; see also Ronald Dworkin, "Law's Ambition for Itself" (1985) 71:2 Va L Rev 173 [Dworkin-Ambition].

<sup>75</sup> See Thomas Aquinas, "Treatise on Law" in AI Meldon, ed, *Ethical Theories: A Book of Readings*, 2nd ed (Englewood Cliffs, NJ: Prentic-Hall, 1967) at 192-216.

<sup>76</sup> See *ibid.*

<sup>77</sup> See generally Finnis-*Natural supra* note 73 at 100-27 (Finnis argues that the combination of his nine basic requirements of practical reason equates to morality).

<sup>78</sup> See generally Murphy-*Rationality supra* note 73.

<sup>79</sup> Not all contemporary Naturalists choose this more secular route: see e.g. Robert P George, *In Defense of Natural Law*, (Oxford, UK: Oxford University Press, 1999).

regardless of the language used and the period of time in which an argument falling within the purview of Naturalism is made, it is a fundamental requirement of Naturalism that there be a necessary connection between law and morality, and this fundamental requirement may be called the NCT.

### **1.2.2 Fuller, Morality, and Validity – Procedural Natural Law Theory**

As previously mentioned, a second fundamental thesis of Naturalism that is interrelated with the NCT is the Validity Thesis. The Validity Thesis states that when a law is immoral in content, or violates fundamental notions of morality, then that law is not a valid law at all and, consequently, one would not be obligated to follow it.<sup>80</sup> The thrust of the thesis is that the validity of a law is based on its content, and when its content is immoral or runs afoul of fundamental principles of morality, that law will be void of legal validity.<sup>81</sup>

A thought experiment by Lon Fuller will help illustrate the point. In *The Morality of Law*, through an entertaining allegory, Fuller proffered eight ways by which one could make law fail.<sup>82</sup> Fuller's eight ways are: 1) fail to make rules such that any institutional decision is *ad hoc*; 2) fail to make rules known, or to provide a way by which the rules could be made known, to those individuals that the rules so apply; 3) implement retroactive laws to such an extent that the legal system's integrity is undermined; 4) make rules that are so confusing that members of society cannot understand them; 5) enact rules that contradict one another; 6) make rules such that conformity to them is impossible; 7) change rules so frequently that members of a society will be unable to orient themselves to those rules; and 8) fail to communicate the rules properly

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<sup>80</sup> See e.g. Murphy-*Fundamentals* *supra* note 73 at 36

<sup>81</sup> See e.g. Fuller-*Morality* *supra* note 73 at 33-38.

<sup>82</sup> *Ibid* at 33-41.



so that the actual rules and the communicated rules differ substantively.<sup>83</sup> A failure to make law in each of these eight ways essentially boils down to a failure to comply with procedural morality, which Fuller argues will destroy any notion of a legal system and thus any notion of law.<sup>84</sup> In a real sense then, Fuller offers a procedural way by which the content of a law, void of morality, will affect that law's validity. This thought experiment brings to focus the merits of the Validity Thesis.

I will make one final introductory point with respect to the Validity Thesis. The thesis is one of degree, and includes a strong version and a weak version. The strong version, namely that a law is not a law if it is immoral in character, was mainly advanced by some of the classical Naturalists such as Plato and St. Augustine. It, just like the procedural view above (a weaker version), runs contrary to the Sources Thesis, with this thesis, it will be remembered, being unconcerned with any moral evaluation of a law or set of laws. To be fair, some of the contemporary Naturalists do not necessarily subscribe to the strong version of the Validity Thesis, as they would be content to rest upon a weaker version of it.<sup>85</sup> But what is important is that no matter the form, whether strong or weak, the Validity Thesis overall recognizes that the validity criteria of law is in one way or another *constrained* by morality, and it is this point that shall prove important for this project. It is, what Finnis would call, a 'central case' for Naturalism, i.e. a state of affairs that goes to the theory's focal meaning.<sup>86</sup> In the words of Finnis, identifying the central cases and focal meaning will allow one to exploit "[t]he systematic multi-significance of one's theoretical terms (without losing sight of the 'principle or rationale'

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<sup>83</sup> *Ibid* at 39.

<sup>84</sup> *Ibid*.

<sup>85</sup> See e.g. Finnis-*Natural* *supra* note 73 at 363-66 (Finnis argues that when the traditional Naturalists stated that an unjust law is not a law, they were meaning this only with respect to law's focal meaning: see *infra*. The argument being that law has a focal or core meaning that holds that unjust laws are no laws at all; therefore, if there exists an unjust law, it would run contrary to the focal meaning of law thus rendering it not law *per se*).

<sup>86</sup> *Ibid* at 9-11 (The idea of a focal meaning, as Finnis correctly notes, is attributable to Aristotle's *Eudemian Ethics*).

of this multi-significance)...”.<sup>87</sup> In other words, while the nuances and the inferred implications of a thesis within a theory have their own significance, one should be careful not use these to obscure the principle or rationale underlying it all.

### 1.2.3 Dworkin’s Theory of Interpretation

Ronald Dworkin outlined his view of Interpretive Legal Theory, or Interpretivism, in an article titled “Law’s Ambition for Itself”,<sup>88</sup> and this theory was extensively developed in a number of different publications including, most notably, his seminal book on the nature of judicial adjudication, *Law’s Empire*.<sup>89</sup> The former is helpful because of the way in which it outlines the basics of Interpretivism, and the latter is useful as it significantly builds upon those basics and applies them in a variety of ways. In what follows I will refer to both his article when instructive and also *Law’s Empire* when further detail is required.

There are three stages to Interpretivism in general. Firstly, at the preinterpretive stage, one goes about identifying the applicable rules and standards that may govern a problem.<sup>90</sup> Then, at the second or interpretive stage, the individual comes to settle on a ‘general justification’ of the rules and standards identified at the preinterpretive stage.<sup>91</sup> And, finally, at the postinterpretive stage, the individual refines the justification as needed in the context of the problem at hand.<sup>92</sup> Therefore, for Dworkin, the proper model of judicial adjudication (i.e. Interpretivism) “[d]istinguishes between the positive law – the law in the books, the law declared in the clear statements of statutes and past court decisions – and the full law, which [the model]

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<sup>87</sup> *Ibid* at 10-11.

<sup>88</sup> *Supra* note 74.

<sup>89</sup> *Supra* note 73; see also Ronald Dworkin, *A Matter of Principle*, (New York, NY: Oxford University Press, 1985) [Dworkin-*Principle*] at 119-45.

<sup>90</sup> See *ibid* at 65-66.

<sup>91</sup> See *ibid* at 66.

<sup>92</sup> See *ibid*.

takes to be the set of principles of political morality that taken together provide the best interpretation of the positive law.”<sup>93</sup> In essence, Dworkin’s interpretive model *requires* the consideration and application of moral principles in every instance of adjudication so that the positive law is shown “[i]n the best possible light”.<sup>94</sup> Dworkin’s Interpretivism flows from his concept of law as integrity, a theory that rejects both Positivism (for being overly concerned with past rules and standards) and Pragmatism (for being overly concerned with future consequences).<sup>95</sup> Instead, and in order for law to have integrity, law must be seen as being a balance of these extremes. Dworkin argues that this is possible through Interpretivism.

An interesting, though controversial, thesis that flowed from Interpretivism was the Right Answer Thesis. For Dworkin, when law and adjudication are understood in the proper interpretive sense, it is revealed that every legal issue has a ‘right answer’.<sup>96</sup> A right answer can be reached in any one case because two factors are taken into consideration pursuant to the interpretive process. Firstly, a judge considers which moral principles from a set of moral principles best fit the positive law in question. Secondly (and subsequently), the judge chooses the one moral principle out of the fitting principles that best justifies the law in the context of the

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<sup>93</sup> Dworkin-Ambition *supra* note 74 at 176 (While I state ‘proper’, Dworkin does not see his theory as evaluative. Instead, at least arguably, Dworkin’s theory is of how judges *actually* decide issues through interpretation).

<sup>94</sup> *Ibid*; see also Dworkin-*Empire* *supra* note 73 at 256.

<sup>95</sup> See generally Dworkin-*Empire* *supra* note 73 at 225 (Dworkin fully develops the concept throughout the entire book, but see especially at 176-275).

<sup>96</sup> See generally Dworkin-*Principle* *supra* note 86 at 119-45. (I note that Dworkin, over the years, has somewhat softened his claim, although I would suggest that up until his death he still held it: see e.g. Ronald Dworkin, *Justice in Robes*, (Cambridge, MA: Harvard University Press, 2006) at 41-43 [Dworkin-*Robes*]. Dworkin states:

My thesis about right answers in hard cases is, as I have said, a very weak and commonsensical legal claim. It is a claim made within legal practice rather than at some supposedly removed, external, philosophical level. I ask whether, in the ordinary sense in which lawyers might say this, it is ever sound or correct or accurate to say, about some hard case, that the law, properly interpreted, is for the plaintiff (or for the defendant). I answer that, yes... .

In a textual footnote to the latter statement, Dworkin takes pains to point out that he has never said that individuals will all agree as to what the right answer is in hard cases, but just that there may be a right answer amongst the various positions of disagreement.

case.<sup>97</sup> Dworkin notes that judges may at times disagree about the outcome of a case because they may have different justifications, but this does not change the fact that, for Dworkin, one of the justifications is always better (i.e. the one principle that best justifies the positive law).<sup>98</sup> In the end then is the best morally justified answer grounded in positive law for each and every case. And for Dworkin, such answers may be labelled ‘right answers’.

I should pause here to offer a side note. Dworkin would not have actually referred to himself as a Naturalist. In fact, he did not find such classifications to be helpful for he believed they obscured the nature of his work.<sup>99</sup> That said, and as one may have already noted, Dworkin’s Interpretivism is consistent with the Naturalist paradigm because Interpretivism is inextricably linked to morality and moral theory, and uses morality to constrain the positive law. One thus could argue that Interpretivism is consistent with Naturalism, including the NCT, because it incorporates moral principles, and consequently morality, into every instance of adjudication. It fuses the positive law with morality, thus creating a necessary link between the two. Ultimately then, for this project’s purposes, it is both sufficient and proper to include Dworkin’s theories amongst the paradigm of Naturalism.

### **1.3 Pragmatic Legal Theory**

Having now outlined the foundations of both Positivism and Naturalism, the remaining theoretical paradigm to be discussed is Pragmatism. The workings of this paradigm are a bit more difficult to resolve, however, for the concept of Pragmatism may take on a variety of

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<sup>97</sup> Dworkin-Ambition *supra* note 74 at 177-80.

<sup>98</sup> *Ibid* at 121; see also Dworkin-*Empire* *supra* note 73 at 239, 380 (Dworkin here introduces his imaginary judge Hercules, a judge with superhuman intellectual powers and no practical constraints such as time).

<sup>99</sup> As mentioned in note 37, Raz shares a similar view with respect to his work and Exclusive Positivism. In addition, Finnis offers similar cautions in his Preface to *Finnis-Natural* *supra* note 73 at v.

different meanings. In a sense, it is somewhat malleable. For example, some proponents of the paradigm focus on efficiency when discussing Pragmatism, while others focus on consequences with a viewpoint as to what would be practical for the future. Others still may combine these ideas (or others) and attribute them to the paradigm of Pragmatism. Likewise, my view of Pragmatism, revealed in Chapter 4, will combine certain aspects of these things, while also introducing other considerations. Nevertheless, it will be useful to highlight some theses of Pragmatism that will bear some significance for this project, such as, what I label, the ‘Multiple Right Answers Thesis’ or MRAT and the ‘Best Choice Thesis’. In the end, while my view of Pragmatism may diverge from others, these two theses will be built upon to provide a more complete explanation of the nature of judicial adjudication as compared to, in my view, those that have come before.

### 1.3.1 Pragmatism and Theory

Before a discussion of the applicable theses takes place, a brief note by way of digression is in order. At a philosophical level, the term and beginnings of Pragmatism, separate from legal Pragmatism, can be attributed to Charles Sanders Pierce, William James, and John Dewey.<sup>100</sup> The collective works of these individuals brought to bear the importance of practical considerations with respect to action and truth, amongst other things.<sup>101</sup> These three individuals gave in-depth accounts of the relationship between Pragmatism and topics such as psychology,

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<sup>100</sup> Select writings of these individuals include: Charles S Pierce, *The Essential Pierce: Selected Philosophical Writings*, by Nathan Houser & Christian Kloesel, eds, (Bloomington, IN: Indiana University Press, 1992) vol 1 & vol 2; William James, *Pragmatism: A New Name for some Old Ways of Thinking*, (Whitefish, MT: Kessinger Publishing Press, 2010); John Dewey, *The Essential Dewey* by Larry A Hickman & Thomas M Alexander, eds, (Bloomington, IN: Indiana University Press, 1998) vol 1 & vol 2.

<sup>101</sup> See generally *ibid*; see also Christopher Hookway, *Pragmatism*, Edward N Zalta (ed) (Spring 2010) The Stanford Encyclopedia of Philosophy online: <<http://plato.stanford.edu/entries/pragmatism/>> [Hookway].

education, democracy, and ethics.<sup>102</sup> These accounts, and the various arguments found within, are outside the scope of this project, and therefore I will not spend much time specifically dwelling on these authors' works. Instead, I will look to more recent theorists that have applied the concept of Pragmatism to law. In particular, I will draw on the work of Richard Posner (a more law and economics based Pragmatist) and Margaret Radin (a more practical and pluralistic based Pragmatist).<sup>103</sup> Together, these theorists will aid in establishing a workable foundation to be returned to later.

It is interesting to note that some may be of the view that the terms Pragmatism and theory are actually antithetical to one another because the latter deals with abstract thought and general thinking while the former is more concerned with specific practical considerations.<sup>104</sup> Philosophy and practicality are sometimes considered analogous to oil and water. Indeed, some proponents of Pragmatism might suggest that the paradigm is simply a useful explanation of necessary practicalities as opposed to any general theory. That said, while the merits of such a claim are debatable,<sup>105</sup> implications from this debate have no bearing upon this project, and I will not undertake to engage the puzzle here. It will be enough to generally hold that Pragmatism is able to inform and clarify aspects of a general theory of law, such as the aspect of judicial adjudication in a theory of law as dimensions.

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<sup>102</sup> See generally *ibid*.

<sup>103</sup> See especially Richard A Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008) [Posner] and Margaret J Radin, "The Pragmatist and the Feminist" (1990) 63 S Cal L Rev 1699 [Radin].

<sup>104</sup> See e.g. Richard A Posner, "The Problematics of Moral and Legal Theory" (1999) 111 Harv L Rev 1640.

<sup>105</sup> See e.g. Shapiro-*Legality* *supra* note 13 at 22-25 (Shapiro gives an answer to the question 'Why Care' with respect to legal theory. In essence, he argues that theory has practical effects and, therefore, is useful in a practical sense); Dworkin-*Robes* *supra* note 96 at 49-74 (Over the course the chapter, Dworkin defends legal and moral theory from the attacks of Posner).

### **1.3.2 The Multiple Right Answer Thesis and the Best Choice Thesis**

The discussion under this heading is much expanded upon in Chapter 4, but for now, it will serve a useful introductory function to outline in basic terms the two theses of Pragmatism that are most pertinent to this project. The theses, again, are the MRAT and the Best Choice Thesis. The former, basically, holds that in any one legal dispute, there exist multiple answers that may solve the dispute in question, and that each of the answers would be correct in law if so chosen as a solution. The latter is a natural result and necessary corollary of the former, and holds that in considering that in any one legal dispute there will be multiple right answers, the function of the judge is to choose which of the answers is ‘best’ in the circumstances. This is a minimalist version of the thesis, and the necessary detail will be added in due time. But before doing so, it will be helpful to consider the fundamentals of both theses in more detail.

### **1.3.3 Posner’s Pragmatism and Judicial Adjudication**

Posner is both a United States appellate level judge and law professor at the University of Chicago. His dual positions give him an interesting background by which to engage in legal theory, especially with respect to judicial adjudication. In his book *How Judges Think*,<sup>106</sup> Posner recognizes the importance of consequences and practicalities, and lucidly illustrates their importance to judicial adjudication.<sup>107</sup> As an introduction to the paradigm, Posner states that:

‘Pragmatism,’ in the sense in which the word is used in the pragmatic theory of judicial behavior, [requires] careful definition. But for now it is enough to note that the word refers to basing judgments (legal or otherwise) on consequences, rather than on deduction from premises in the manner of a syllogism. Pragmatism bears a family resemblance to utilitarianism and, in a commercial society like ours, to welfare economics, but without a

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<sup>106</sup> *Supra* note 103.

<sup>107</sup> *Ibid* at 40.

commitment to the specific ways in which those philosophies evaluate consequences. In law, pragmatism refers to basing a judicial decision on the effects the decision is likely to have, rather than on language of a state or of a case, or more generally on a pre-existing rule.<sup>108</sup>

The main point is that judges, as Pragmatists, are mainly concerned with the potential implications of any decision that they may make, and thus find foundational guidance in those implications when deciding any one case. A second point of importance derivable from this quote is that the decision is not *based* on deduction or reasoning by syllogism, and because it is not so based, a different type of decision making mechanism is to be engaged.

Posner's Pragmatism has an additional characteristic to it, that being one of cautionary realism,<sup>109</sup> and this characteristic, in a sense, underlies the Best Choice Thesis. As Posner notes:

Pragmatism provides local rather than universal guidance to judicial action. And its local utility depends on the degree to which the society is normatively homogenous. The more homogenous, and therefore the wider the agreement on what kind of consequences are good and what kind are bad (and how good and how bad), the greater the guidance that pragmatism will provide.

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Although pragmatic adjudication rarely generates enough information to enable a decision that produces a social optimum, often it produces an approximation that is good enough for the law's purposes.<sup>110</sup>

Embedded in this reasoning is the notion that although Pragmatism has inherent limits, it will on most occasions be apt to produce a decision that is sufficient for the time and for the law's purposes.

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<sup>108</sup> *Ibid.*

<sup>109</sup> In using the term 'realism', I am not speaking of the theoretical paradigm of Legal Realism, but instead use the term as being characteristic of Posner's account of Pragmatism.

<sup>110</sup> Posner-*Judges supra* note 103 at 241.



The above two passages touch upon two key Pragmatist concepts. Firstly, Posner notes that judges must ultimately base their decisions in consequences. This requires forward looking methodology and practical considerations. And, secondly, Posner recognizes that there will never be an ideal decision, for any and all decisions have their pros and cons, good consequences and bad consequences, and judges therefore can only make the best decision in any one circumstance. Ultimately then, on Posner's view, Pragmatic judicial adjudication is the result of a judge analyzing the consequences that a decision will bear, recognizing the utility of the different kinds of consequences (thus rendering one able to find some decisions more desirable as compared to others), and then selecting the best decision possible.

As may already be apparent, the two concepts flowing from Posner's Pragmatism are inextricably linked to both the MRAT and the Best Choice Thesis. Because judges are duty bound to make a decision in any one case no matter the difficulty in so doing, a consideration of consequences implies that there is more than one potential option. If there was only one option that could be so chosen, a consideration of consequences would be fruitless, for the consequences would be automatic and necessary. It only makes sense then that there would be multiple answers in legal disputes, any one of which would be correct in law and thus 'right'. This accords with the MRAT. In addition, Posner's recognition that non-ideal circumstances will underpin all legal disputes suggests that the best judges can do in adjudicating these disputes is select options that result in the best consequences, and this accords with the Best Choice Thesis.

### 1.3.4 Radin and Pragmatism

While not necessarily a general legal theorist, in my view Radin has written a number of important articles with respect to Pragmatism, including one that will prove especially instructive for this project titled “The Pragmatist and the Feminist”.<sup>111</sup> In her article, Radin argues, in the context of women’s issues, that the consequences flowing from choices relating to such issues are non-ideal in nature, and that no matter the situation that may arise whereby choice is needed, harm will manifest itself regardless of the ultimate choice.<sup>112</sup> Radin’s argument, however, need not be restricted to women’s issues, as it may be generalized in the following way. Whenever one must make a decision, one will necessarily be confronted with harmful consequences and beneficial consequences that flow from that decision. The question then is what one is to do with these consequences. For Radin, the decision will be one of choice, with the ultimate choice involving considerations of which decision (and the consequences flowing therefrom) will do the least amount of harm and/or conversely the most amount of good.<sup>113</sup>

## 1.4 Conclusion

At the beginning of this Chapter, I set out to describe the fundamentals of Positivism, Naturalism, and Pragmatism. These fundamentals present themselves through a series of theses, some of which fundamentally conflict with others. For example, Positivism’s Sources Thesis and Social Fact Thesis, in conjunction with the Separability Thesis, fundamentally conflict with Naturalism’s NCT and Validity Thesis. This is largely due to the fact that, on the one hand,

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<sup>111</sup> Radin *supra* note 103; see also Margaret Radin, “Market-Inalienability” (1987) 100 Harv L Rev 1849 and Margaret Radin, “Justice in the Market Domain” in John W Chapman & J Roland Pennock, eds, *Markets and Justice* (New York, NY: NYU Press, 1989).

<sup>112</sup> Radin *supra* note 103 at 1700.

<sup>113</sup> *Ibid* at 1701.

Positivism insists on a distinction between law and morality, whereas Naturalism, on the other hand, does not and in fact insists the opposite. In addition, two different theories of judicial adjudication were described. The first, Interpretivism, insists that judges apply moral principles in order to come to the right decision in each and every case. The second, stemming from Pragmatism, insists that judges recognize that in any one legal dispute there will be multiple right answers, and that they must therefore focus on the consequences of their decisions in order to determine which answer is 'best' in the circumstances of any one case. These two theories were also fundamentally at odds with one another, for Interpretivism held that in every case there will be one right answer, whereas Pragmatism held that in every legal dispute there will be multiple right answers.

All of the theses and their parent theoretical paradigms claim to be correct and fundamental to any proper explanation of the nature of law, yet the inescapable truth (or so it would seem) is that each finds irreconcilable conflict with one or more of the others. The result is a significant conundrum. The conundrum is compounded by the fact that each theoretical paradigm appears not only plausible, but also logical, persuasive, and filled with substantial value. Therefore, what is one to do? Should one simply pick sides? Should one remain agnostic, waiting for more convincing arguments to be advanced over time, and then, at that time, pick sides? Or, is there another, perhaps more suitable, option? I am of the view that there is a more suitable option, and it may be called the theory of law as dimensions. The core of this theory is the concept of a dimension, and therefore in order to understand what is meant by the concept, I now turn to Chapter 2 to discuss the fundamentals relating thereto.

## **Chapter 2: Fundamentals of Dimensions and the Basic Elements of Time**

Having navigated the fundamentals of various theoretical paradigms found within legal theory, it will prove useful to now turn attention to the fundamentals of the theory of law as dimensions. The plan for this chapter is to develop a foundation for my theory of law as dimensions, one sufficient for a dimensional analysis that is to take place in PART II. So, before discussing any of the substantive content of the dimensions themselves, it will be instructive to first consider what the concept of a dimension is. Armed with this concept, I will be in a better position to explain why dimensions are needed to more fully and accurately explain the nature of law.

I begin this chapter by briefly discussing the history of legal theory, how developments within that history have led to increasing complexity, and how this complexity eventually leads to increased confusion worthy of remedy. This history lesson, of sorts, will act as a primer for further discussions involving the nature of dimensions, including what dimensions are and why they are useful to legal theory. The reasoning here will lead me into a brief analysis of the discipline of theoretical physics, with the goal of drawing an analogy between spatial dimensions and law's dimensions. This will be followed by an analysis of the elements of time, and how these elements assist in defining each of law's dimensions. I will then consider a methodological distinction in a theory of law as dimensions, namely whether it entails conventional theorizing, an exercise in 'meta-theory', or both. Finally, I end the chapter by revisiting the three questions posited in the introduction to this project. In this regard, I will begin to suggest that a theory of law as dimensions assists in solving the Tertiary Question, namely the delimitation issue between

law and morality, or in other words, whether or not law has any necessary connection to morality.

## 2.1 Complexity and Legal Theory

Legal Theory is somewhat conflicted by a complex history, with this complexity compounding over time. At first blush this point may appear somewhat trivial, and perhaps even a bit obvious, because any question about the nature of a field of study within the humanities (or, in actuality, most fields of academic study) is bound to be riddled with similar complexity. For academics, this point is straightforward and a simple matter of fact. It is something that comes with the territory so to speak, and normally does not attract much concern. Questions such as: what is sociology? or what is anthropology? philosophy? etc. do not easily lend themselves to quick and adequate responses. Definitions, in this regard, are slippery, elusive, and unforgiving. One might answer the question what is law? with the (rather unhelpful) answer, ‘well, law is the study of law’, but answers such as these merely beg a whole host of further questions. For example: What is the study of law? Why does one study law? Why is there law in any event? What is the goal or purpose of law? Does law have any goals at all? Is law a matter of sociological fact? Is it even possible to define law at all?<sup>114</sup> and on and on. The more one questions the more it becomes apparent that a complete and accurate account of the nature of a thing – for the purposes of this project, that thing being law – is an account that provides us with a complete and accurate account of the *true* nature of that thing. It therefore follows that I shall be generally occupied throughout this project with seeking an explanation that provides an account of the *true* nature of law. This is an exercise in truth seeking, and it is this seeking of

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<sup>114</sup> See e.g. HLA Hart, “Definition and Theory in Jurisprudence” in HLA Hart, *Essays in Jurisprudence and Philosophy*, (Oxford, UK: Oxford University Press, 1983) at 21-48.

truth that contributes to the increasing complexity that has compounded legal theory over the course of history.

The search for any one single ‘truth’, a search open to a vast pool of truth seekers limited only by an individual’s willingness to actually commit to seeking out the truth and having competency in so doing, will naturally produce a wide variety of different perspectives with respect to opinions of or about the truth. These perspectives eventually come to be reinforced by the variety of positions consisting of reasons advanced by the proponents of those perspectives with the hope that those reasons eventually persuade other truth seekers to adopt a particular perspective as the truth, and consequently abandon others. The proponents may be so successful that they persuade other truth seekers to build upon their opinion of the ‘truth’. Others, we may call them opponents of those perspectives, look to advance alternative perspectives supported by their own positions and reasons, and in doing so criticize the positions and reasons of the currently held perspective with respect to the ‘truth’. All the while, these individuals have in their minds the same overall goal of clarifying the ‘truth’, or (in cases of a paradigm shift) finding and then grounding a more accurate ‘truth’. The process then repeats itself *ad infinitum*. As one may generally notice then, this overall process has significant potential to bring into existence a variety of different perspectives with respect to the ‘truth’, with each of these being both supported and criticized, in varying degrees from minimal to great, by the proponents and opponents of the perspectives (or ‘truths’).<sup>115</sup> These ‘truths’ eventually come to be solidified as theories of the nature of the thing in question, or in shorter terms, theoretical paradigms.

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<sup>115</sup> An example of this occurring in legal theory (one of many) was when Hart published his *The Concept of Law*. The arguments and theories presented in the book were paradigm shifting and resulted in both future proponents and opponents of Hart’s theory. Proponents include those authors mentioned in Chapter 1 under the heading Inclusive Positivism. Opponents include Naturalists such as Fuller, Finnis, and Dworkin. Hart’s book even sparked people to take hybrid positions, such as is seen in the works of Raz and Shapiro.

The overall process, however, in a somewhat natural way, results in increasing complexity and confusion. As the complexity grows, it may result in increasingly heightened confusion. If both the complexity and the confusion lead to significant misunderstandings about and within the project itself, or if they result in misplaced or misguided paradigms, then those paradigms are no longer helpful to the truth seeking goal. What results is theoretical fragmentation, the nature of which has the opposite effect that the goal of seeking out the truth aims to achieve. In other words, theoretical fragmentation obfuscates the truth.

A true theory of law then, in my view, is one that inches as close to the truth as possible. In order for it to do so, it must both provide a true account of the nature of law while also remedying any theoretical fragmentation. The theory of law that I will unravel in this project is one that I hope *begins* to do just this. It does so by taking some of the leading ‘truths’ with respect to the nature of law and then attempting to amalgamate these ‘truths’ in such a way that some, though not all, fragmentation may be remedied. The result is a potentially far reaching theory that both unites aspects of the leading theoretical perspectives in legal theory, and at the same time filters out some insufficiencies which have come to plague those same perspectives. The way by which all of this may be demonstrated is through theoretical ‘dimensions’. So with this in mind, it is time to consider what exactly I mean by the concept of ‘dimensions’.

## **2.2 What are Dimensions?**

The main thrust and substance of a theory of law as dimensions comes from the idea that law *exists* within a series of separate yet related ‘dimensions’. Because the concept is foundational, it is prudent and useful to take time to dwell upon the question: what is meant by dimensions? In short, dimensions are specific vantage points that have a very important effect

on the way by which individuals view and process information. Once one commits to viewing and processing information through any one specific dimension, one will not be able to recognize, view, or process information through any other dimension *at the same time*. Put another way, when one commits to viewing and processing information through a certain dimension, one will *only* be able to view, process, identify, analyze, critique, etc. information through the vantage point of that dimension. The unique vantage point of one dimension, in a sense, effectively forbids one from being able to take advantage of the unique powers associated with other dimensions. This fact, however, does not stop one from being able to change the vantage point (i.e. dimension) from which one operates within on a different occasion at a different point in time. By analogy, the idea of viewing a concept dimensionally, meaning from other vantage points, is akin to having the ability to view objects in a room through night vision goggles, versus heat sensor goggles, versus the naked eye. Within the example, each different vantage point (night vision, heat vision, naked eye) gives the observer unique information and, ultimately, provides the individual with a different way by which s/he will access and process information, with the arguments founded upon that information being unique to the vantage point supplying that information, which will be separate from other vantage points.

The concept of a dimension can be applied to legal theory. For example, if one is operating within one of law's dimensions, meaning one is viewing and processing law related information through a specific vantage point, say the 1<sup>st</sup>-dimension of law, if one is to make cogent arguments, one would be required to formulate such arguments with content that is consistent with the intrinsic properties and characteristics of that dimension. The same would hold true of the 2<sup>nd</sup> and 3<sup>rd</sup> dimensions as well. I recognize, however, that this seems to beg the following questions: what are the intrinsic properties of the different dimensions, and how is one



to both identify and distinguish those dimensions? Over the course of this chapter, these questions will be answered in full, but for now it is enough to state, as an introduction, that the intrinsic properties of each dimension are those general properties that are now considered fundamental to Positivism, Naturalism, and Pragmatism. So, for example, if one seeks to advance an argument that is Positivistic in nature, i.e. grounded in fundamental Positive Law doctrine, one would be required to operate within the 1<sup>st</sup>-dimension of law. Similarly, when one aims to advance an argument that is grounded in fundamental Pragmatist doctrine, one would be required to operate within the 2<sup>nd</sup>-dimension of law. And, finally, when one looks to advance an argument that is grounded in fundamental Natural Law doctrine, one would be required to operate within the 3<sup>rd</sup>-dimension of law. It follows from this that if one chooses to advance certain arguments while operating within a dimension whose fundamental doctrine is such that it conflicts with that argument, the argument will be mistaken. Ultimately, each dimension, consisting of a different theoretical perspective, is a unique vantage point by which one may view law, and an amalgamation of these dimensions provides a way by which one can embark on a path towards a more complete and unified theory of law.

### **2.2.1 The Importance of Other Fields of Study to Legal Theory**

The nature of legal theory is such that it may be illuminated through the use of other fields of study. In *Legality*, Shapiro helpfully explains the importance of other fields of study by drawing an analogy between the study of law and the study of water.<sup>116</sup> Shapiro states:

In some instances, conceptual analysis can be completed only by consulting a scientific theory. For example, the analysis of the concept of WATER tells us that something is water just in case it has the same internal structure as the stuff that is in the lakes, rivers,

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<sup>116</sup> *Supra* note 13 at 406, n 16 [emphasis added].

and oceans that we see around us. But the concept alone does not specify what the internal structure of water is (the ancient Greeks grasped the concept of WATER even though they didn't know that water is H<sub>2</sub>O). In order to know the internal structure of water, one must look to the a posteriori theory that tells us about the inner structure of material bodies, namely, chemistry. *To give a more complete answer to the question "What is water?" therefore, one must look to a scientific theory that tells us about the constitution of water.*<sup>117</sup>

Shapiro goes on to note that Hart began to do just this, leaning on what Hart called 'descriptive sociology' in *The Concept of Law*,<sup>118</sup> but that the field of sociology has its limits with respect to what it can aid one in understanding about the nature of law.<sup>119</sup> So in having identified these limits, Shapiro formed grounds to suggest other fields of study that will be both useful and needed in explaining a more complete theory of law. In his view, a view I think correct, it is both useful and necessary to lean on certain *scientific* fields of study. For his part, Shapiro engaged with and leaned on the study of human psychology and human character, leading to the conclusion that humans are planning creatures. This, in turn, led to a deeper theory of law as plans.

For this project, a similar acceptance of the limits of a purely sociological explanation of law will be apparent, and a similar acceptance of the need to lean on other fields of study, especially scientific fields of study, will take place. The complexity of legal theory is such that it is multi-layered, or what I will explain as being multi-dimensional. But in order to understand

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<sup>117</sup> *Ibid* [emphasis added]-

<sup>118</sup> *Supra* note 6 at vi. In the Preface, Hart states that his book, [m]ay also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into the meanings of words merely focuses light on words is false. Many important distinctions, which are not immediately obvious, between types of social situations or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and the way in which these depend on social context...".

Hart goes on to eloquently demonstrate throughout his book what this 'descriptive sociology' is and the power that it lends to one engaging in theorization of the nature of law.

<sup>119</sup> *Shapiro-Legality supra* note 13 at 406-07, n 16.

the dimensional character of law, I will need to lean on the scientific field of theoretical physics just as Hart leaned on sociology and Shapiro on psychology. As Shapiro explained with his theory of law as plans, the exercise will be more than simply one of analogy. It will be *foundational* in that the concepts and principles infused within the field of theoretical physics with respect to spatial dimensions will come to underpin the theory of law as dimensions.

### **2.2.2 Gaining Insight from Theoretical Physics and Spatial Dimensions**

Borrowing tools from other disciplines of study can significantly assist one in elucidating a more complete theory of various phenomena. To better clarify what is meant by ‘dimensions’, it is instructive to draw upon the field of theoretical physics and that discipline’s explanation and use of *spatial* dimensions. In this regard, and to aid in understanding the power of spatial dimensions, I will draw upon the work of Michio Kaku, a world renowned theoretical physicist and highly respected expert in the discipline of string-field theory, a field that he co-founded. One of Kaku’s greatest gifts is his ability to explain highly complex physics based concepts and ideas to the layperson. His examples and analogies are especially helpful, and I will thus borrow from them to illuminate law’s dimensions.

In his book titled *Hyperspace*,<sup>120</sup> Kaku explains that in order for one to be able to fully resolve physics based problems, one must resort to viewing the universe in a dimensional way.<sup>121</sup> In the words of Kaku,

To understand how adding higher dimensions can simplify physical problems, consider the following example: To the ancient Egyptians, the weather was a complete mystery. What caused the seasons? Why did it get warmer as they traveled south? ... The weather was impossible to explain from the limited vantage point of the ancient Egyptians, to whom

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<sup>120</sup> (New York, NY: Oxford University Press, 1994).

<sup>121</sup> *Ibid* at ix.

the earth appeared flat, like a two-dimensional plane. But now imagine sending the Egyptians in a rocket into outer space, where they can see the earth as a simple whole in its orbit around the sun. Suddenly, the answers to these questions become obvious.

From outer space, it is clear that the earth's axis is tilted. ... Hence we have winter and summer. And since the equator receives more sunlight than the northern or southern polar regions, it becomes warmer as we approach the equator.<sup>122</sup>

Kaku's main point is actually quite simple: until one views the world through each of the different spatial dimensions, certain physics based problems will remain unanswerable definitively. One may speculate as to the reasons why certain physical phenomena occur, but one will ultimately be unable to give a definitive response to the problem. One will not have access to the true reasons as to why certain things exist as they do. This is because each different dimension provides a special vantage point by which one may view phenomena. For physics, each spatial dimension provides a unique way by which individuals may view physical phenomena such as space. For law, in a similar way, each legal dimension provides a unique way by which individuals may view law.

Kaku provides another useful example that illustrates how spatial dimensions aid in bringing about heightened levels of clarity and thus coherence.<sup>123</sup> Kaku states that when analyzing phenomena, the adding of a dimension,

[c]an make things simpler. ... The great Roman wars, often involving many smaller battlefields, were invariably fought with great confusion. ... With battles raging on several fronts, Roman generals were often operating blind. ... That is why one of the first principles of warfare is to seize high ground—that is, go *up* into the third dimension, above the two-dimensional battlefield. From the vantage point of a large hill with a panoramic view of the battlefield, the chaos of war suddenly becomes vastly reduced. *In other words, viewed from the third dimension... the confusion of*

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<sup>122</sup> *Ibid* at viii-ix.

<sup>123</sup> See *ibid* at 13.

the smaller battlefields *becomes integrated into a coherent single picture*.<sup>124</sup>

Kaku's example is indicative of the fact that dimensions assist in an analysis of phenomena in such a way that greater levels of coherence are achievable. In other words, they assist in reducing confusion and fragmentation. Ultimately, the dimensions of law, once understood as together aiming to bring about a more coherent depiction of law, have the potential to assist in decreasing confusion and fragmentation within legal theory and amongst legal theorists, and may even provide the basis to begin building a clearer conception of the nature of law.

There is one final point in this regard that requires some initial emphasis. While the different dimensions involve different vantage points and are therefore distinct from one another, they are also related to one another. For spatial dimensions, each shares a relationship to space. For law's dimensions, each not only shares a relationship with the law, but they also share a relationship with time. Law's dimensions are thus appropriately labelled time-based dimensions. Now, the time aspect of law's dimensions not only relates them to one another, but also provides a point of distinction between them. Each dimension of law utilizes time in a specific way and is therefore defined accordingly. But before one is able to understand how each dimension is to be defined according to time, one must first come to understand, what I call, 'The Basic Elements of Time'.

### **2.3 The Basic Elements of Time**

If one delves deeper into law's dimensions, one will come to engage with the basic elements of time. In philosophy, or specifically within a subset of philosophy known as the

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<sup>124</sup> *Ibid* [emphasis added].

philosophy of time, this type of subject matter is often referred to as the topology of time.<sup>125</sup>

When I speak of the basic elements of time within law and law's dimensions, it will be a slightly modified version of the 'standard typology of time'.<sup>126</sup> The standard typology holds that "[t]ime should be represented by a single, straight, non-branching, continuous line that extends without end in each of its two directions."<sup>127</sup> For the purposes of this project, the standard typology will be modified such that time does not continue without end in *both* directions, but instead that it continues without end in *only one* direction. That direction is forward, or towards the present day, in legal time. The reason for this is that if one is to proceed in the other direction, that being backwards in legal time, conceptually one will eventually come to an endpoint that represents the beginning of legal time. This end point can be seen as aligning in parallel to the standard topology of time, just not extending *ad infinitum* as it would if it was actually within the standard topology of time. Applying such a modification is logically sound because at a more general level of abstraction, one can envision a point in time where law, no matter how basic in form, actually began. This is so and independent of the fact that one cannot envision the same for the standard typology. And, I believe, it need not trouble one that law may have begun at different times for different legal systems. All that matters is that law in a general sense has a starting point; that being when the indicia of legal norms crystalize into such.

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<sup>125</sup> See e.g. Ned Markosian, "Time", in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Stanford, CA: The Metaphysics Research Lab, 2010).

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*; see Aristotle, *The Basic Works of Aristotle*, Richard McKeon, ed (New York, NY: Random House, 1941) at 357 (Aristotle was one of the first philosophers to argue that time cannot have a beginning nor an end. In his *Physica* or *Physics*, and in pursuing an argument about motion, he states):

Now since time cannot exist and is unthinkable apart from the moment, and the moment is a kind of middle-point, uniting as it does in itself both a beginning and an end, a beginning of future time and an end of past time, it follows that there must always be time: for the extremity of the last period of time that we take must be found in some moment, since time contains no point of contact for us except the moment. Therefore, since the moment is both a beginning and an end, there must always be time on both sides of it.

Now, using the basic elements of time in a foundational sense, i.e. to establish a foundation for a theory of law and in an attempt to further illuminate the nature of law, constitutes a novel enterprise.<sup>128</sup> Its uniqueness, however, should not detract from its significance, for that uniqueness is born amongst similar themes. Notions of time have proved important in explaining aspects of almost all theories of law<sup>129</sup> (for example, analyzing when in time a law becomes a law both legislatively and through judge made law).<sup>130</sup> Nonetheless, the idea of using the basic elements of time to help ground a broader theory of law is a neoteric one. With this in mind, it would appear that I am venturing into somewhat uncharted territory, and thus must take extra care to be clear in explaining the basic elements of time. The arguments to come may appear unorthodox in methodology, especially when compared to more traditional methodologies adopted by legal theorists in the past. That said, it remains true that the elements of time themselves are rather *uncontroversial*. Indeed, most phenomena that one might come to study may be, in some way, related to or flow from these elements, even if just as a point of reference. It follows that the various uses of the elements may or may not be different depending on the phenomena that is the object of one's study. Of this, one may object, arguing that if there is variation in application, the elements shed their cloak of foundational meaning. Such an

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<sup>128</sup> See Raz-*Authority* *supra* note 7 at vii. (In fact, Raz mentions a fact similar to the one I offer. He recently stated in the Preface to the 2<sup>nd</sup> edition of his book that):

Theories of law encounter a problem which is hardly ever discussed, perhaps because it appears so simple: how to distinguish between what the law is at any particular time, say now, and what it is at a later time, say tomorrow. It is a truism that the law changes over time. Indeed, a good deal of theoretical effort goes into explaining the mechanism by which it changes, the various ways of law-making. That suggests that there is a distinction between what is (part of) the law at any given time and what is not. There is not that much in the writings of theorists which clarifies the distinction. The lacuna is not due entirely to neglect. The answer is elusive, and attempts to find it tend to reflect major fissures in legal theory. One of the main reasons for the difficulty is that changes in the law are not always brought about from outside. The law has a way of directing its own development.

<sup>129</sup> See e.g. *ibid*; see also Christopher Hutton, "Meaning, Time and the Law: *Ex Post* and *Ex Ante* Perspectives" (2009) 22 Int J Semiot Law 279 and Richard HS Tur, "Time and Law" (2002) 22:3 Oxford J Legal Stud 463.

<sup>130</sup> See *ibid*.

argument, however, is misguided, for it is the very ability of the elements to ground theories, or in other words their universal nature with respect to subject matter, that renders them useful.

For this project's purposes, there are three basic elements of time and each will be recognized as unique in content and attaching to *its own* dimension of law.<sup>131</sup> A crucial aspect of the elements is that no two may exist together within the same dimension; such would be conceptually impossible for each element is analytically distinct from each other. In addition, with respect to each dimension, the element attached thereto performs three main functions:

- 1) a coordinating function – it aids in properly coordinating the theoretical paradigm corresponding to it within broader legal theory;
- 2) a defining function – it gives one access to an identifying label for each dimension;  
and
- 3) a delimitation function – it carves out the scope of powers with respect to the corresponding dimensions.

The discussion above, I hope, has been useful in explaining what I mean by the basic elements of time. The discussion, however, was general and abstract. For the idea to be more

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<sup>131</sup> It is plausible to envision more than just these three basic elements of time. For example, there may be an additional element called the 'era element'. This element would be used to identify different patterns which may occur within the law over a select *period* of time. Because this would allow for another unique vantage point by which one would be able to analyze the law, the element could properly ground an additional dimension. But that said, for the purposes of this project, the three basic elements to be outlined are of most pressing concern. Any additional elements would be peripheral in nature with respect to my theory of law as dimensions, and therefore would fall outside the scope of this project.



useful, certain specifics are needed. Therefore, I now turn from the generalities to discuss the specifics of each of the three elements.<sup>132</sup>

### **2.3.1 The First Element of Time: The Single Point in Time**

The first element of time is the point in time. While it is true that there are innumerable points in time, it is only when one speaks of a *specific* point in time that one may be said to be speaking of the first element of time. When one uses the first element of time in analysis, one is taking a more focused view of the object in study. Correspondingly, there are certain properties intrinsic to this type of analysis that aids in achieving a more in-depth study of an object. It is these two things together that form a specific dimension, the 1<sup>st</sup>-dimension.

Now, when the object of study is the nature of law, one can draw upon the first element of time to engage in a specific type of study – a study of the 1<sup>st</sup>-dimension of law. In this dimension, law is analyzed as it exists at any one specific point in time. When analyzed in this way, certain intrinsic properties of the dimension become apparent. These properties correspond to the different theses of Positivism (I will defend this assertion more fully in Chapter 3), which may be seen as flowing from the vantage point imposed by the point in time.

An example may help bring clarity. Generally speaking, in common law systems, law is made in two ways:

- 1) through legislation; and
- 2) through the decisions of judges.

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<sup>132</sup> From time to time I may refer to the basic elements of time as simply elements.

When a legislature, through its appropriate channels and procedures, passes a bill, the result is a piece of legislation that exists in law as law. So long as that legislation remains in effect as is (i.e. is not amended, repealed, struck for being unconstitutional, etc.), that legislation will remain law. Take for example the segregation laws that existed in the United States, commonly referred to as ‘Jim Crow’ laws. At one point in time, these laws were valid laws, yet at another point in time they were rendered unconstitutional by the United States Supreme Court and therefore were no longer valid laws.<sup>133</sup> This demonstrates that *at two different points in time*, the state of the law was drastically different; in fact, mirror opposites of one another. At one point, segregation was allowed under the banner of equality, and at another it was not allowed under the same. What should be apparent is that depending on the *point in time* that one chooses to analyze such a law, the data available for that analysis, as a matter of fact separate and apart from the state of the law, will be quite different. The reason for this is the vantage point conferred by the first element of time, the point in time.

### **2.3.2 The Second Element of Time: The Time Between Two Adjacent Points in Time (i.e. The Change in Time)**

The second element of time is unique from the first in that it allows for analysis pursuant to the properties intrinsic to *a change in time* as opposed to a single point in time. One would, again, be correct in noting that there are innumerable changes in time, but the second element is not concerned with the changes in aggregate. It is only concerned with one single *specific* change in time at any one time. Additionally, it is not simply the fact of the change that is the element’s focus (that would be the focus of the first element), but instead the *process* by which the change takes place. Therefore, in focusing on the process, one commits to attempting to

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<sup>133</sup> See generally *Brown v Board of Education*, 347 US 483 (1954) [*Brown*].

understand not *what* change took place, but *how* that change took place. The exercise is descriptive and not evaluative in nature.<sup>134</sup>

It will prove instructive to again engage with an example. Revisiting the previous one will do. When the United States Supreme Court found the segregation laws in the United States to be unconstitutional, the decision resulted in a change in the law. The change occurred because of a decision of the judges of that Court. If one chooses to analyze the process by which the judges came to that decision, one will be viewing the law through the properties of the second element of time; or, in other words, one be viewing the law from the vantage point of the 2<sup>nd</sup>-dimension of law. Again, a defense of this assertion will not take place here, for it will be left to Chapter 4. But what should be noted now is that the intrinsic properties that flow from the second element, and thus correspond to the 2<sup>nd</sup>-dimension of law, are those of Pragmatism. Thusly, it will be my contention that when judges go about making decisions, they do so Pragmatically, as that term will be so explained. This contention will be supported by an analysis of the legal reasoning of lawyers and the adversarial nature of common law systems of law.

A similar example can be made with respect to legislation. In the United States, after the American Civil War, the Federal Government passed the Thirteenth Amendment to the United States Constitution which ended slavery. The Amendment was subsequently ratified by each of the states. Ultimately, what resulted from the decision to pass the Amendment and ratify it was a change in the law. The change occurred, as all do, as the result of a decision to act. But ultimately it is the process by which that change took place that may be analyzed through the 2<sup>nd</sup>-

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<sup>134</sup> This is not to suggest that one would be forbidden from engaging the evaluative enterprise, thus judging the process as either ‘good’ or ‘bad’. The point is that such an enterprise is of a different character altogether, and is one that does not concern the second element of time. Generally, the dimensions, which the elements are integral to, are vantage points for one to engage in descriptive and analytical philosophy.

dimension of law by the analytical powers conferred by the second element of time, the change in time.<sup>135</sup>

The second element then (and consequently the 2<sup>nd</sup>-dimension of law), is about decision making that effects the incremental changes in the law over time, and it is the great span of all of these decisions, both judicial and legislative, that leads us into the third element of time.

### **2.3.3 The Third Element of Time: From the Beginning of (the relevant) Time to the Ever Changing Present Day (i.e. The Span of Time)**

The third and final element of time is again different and unique from both the first and second elements. As opposed to looking at specific instances of an object at a more micro-level, the third element provides for a vantage point that spans the entire spectrum of an object on a more macro-level. It allows an object to be analyzed from its beginnings to its end, or for objects like law that continue on in time in virtual perpetuity, from its beginnings to its ever changing present day. Some phenomena are continual in nature – law is one of these types of phenomena – and they will thus *span* over a length of time and continue spanning.

The third element of time is, in a sense, a more abstract and full view of an object of study. When this element is invoked, the minute details and specifics of the object as may be viewed through the first and second elements and their corresponding dimensions are blurred. And, because of this, the descriptive analyst must turn to identifying themes, broad goals/objectives, etc. that may begin to become apparent. It is this broad vantage point, conferred by the third element of time, that underpins the 3<sup>rd</sup>-dimension of law.

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<sup>135</sup> In a sense, an argument for pragmatic decision making by legislatures can be seen in Shapiro-*Legality supra* note 13, and notably his conception of law as plans.

Unfortunately, I cannot offer any example at this point similar to that which I did for the first and second elements, or in any event one that will be as readily useful. Because the element requires one to move to a higher level of abstraction, examples will be necessarily abstract. In my view, these types of examples are clearer when placed amongst other arguments in order to provide some context. Such will come later on in this project (Chapter 5) and, therefore, I will save any examples in this regard for then.

With respect to a corresponding theoretical paradigm, the paradigm that corresponds to the 3<sup>rd</sup>-dimension, by way of the third element, is Naturalism. The third element of time and the theses of Naturalism combine to form the 3<sup>rd</sup>-dimension of law. I will defend this position in Chapter 5, where it will eventually be argued that concepts of morality and moral reasoning are integral to this 3<sup>rd</sup>-dimension of law.

## **2.4 Theory or ‘Meta-Theory’**

A mild detour from the discussions of time and dimensions is in order to ponder an issue that seems to follow from a theory of law as dimensions. One may begin to wonder whether or not a theory of this kind is really a theory of law at all or whether, instead, it is merely a theory of (legal) theory. Is the exercise one of conventional theorization, or perhaps more one of ‘meta-theory’? Although dwelling on such a query has quick limits in terms of practical usefulness, especially with respect to this project, in my view it is nevertheless an important question that should be addressed, and so I turn now to address it.

In truth, the query as I have framed it is somewhat misleading, for I have framed it as an ‘either/or’ question when in fact a theory of law as dimensions is *both* a conventional theory of law and a meta-theory, with the former being a natural consequence of the latter. On the face of

it, a theory of law as dimensions may more appropriately be considered a meta-theory because it proffers a way by which one may begin to reconcile theoretical perspectives that have historically come into conflict with one another. In this way, it is a theory about theory, or more accurately, a theory about how to best understand and utilize the theoretical paradigms within the discipline of legal theory itself. With that said, if one is to take a deeper look at some of the consequences that entail from the development of such a theory, one will notice, as a fact, that a unique theory of law begins to develop as a direct result of the meta-theory. Since the meta-theory changes the way by which we view the different paradigms of legal theory, the result may be said to be a new theory of law in a more conventional and analytical sense.

## **2.5 Hume's Law, the Derivative Law, and the Three Questions**

By now, the gist of this project is starting to take shape. The aim is to give some fresh perspective to the question 'what is law' (the Primary Question) with the hopes that doing so will bring about enhanced clarity to the discipline of legal theory. Additional perspective, in this regard, is made possible through the concept of law as dimensions. So, having laid the groundwork for this concept, some final thoughts are in order before moving on to PART II of this project. These thoughts require a revisitation of the notion of Hume's Law and the three questions that were posed in the introduction to this project.

The distinction between what law is and what law ought to be, two concepts integral to the Subsidiary and Secondary Questions, has been a point of contention between legal theorists, especially Positivists and Naturalists. Much of this contention is owed to Hume's Law and the Positivist arguments based thereon. As briefly touched upon in Chapter 1, Hume stated that

a logical fallacy exists when one attempts to derive an ought from an is.<sup>136</sup> Therefore, and as an example, it would be logically fallacious, without more, to argue that simply because it is a fact that a certain white picket fence exists around a house, that it follows that a white picket fence ought to exist around all houses. The ‘ought’ in this instance cannot be logically derived from the ‘is’. In a similar way, Hume’s Law has been used by Positivists as a way of challenging the fundamental tenets of Naturalism, mostly by way of the Separation Thesis.<sup>137</sup> Naturalists, as has been pointed out, argue that all laws ought to be moral, else they not be valid laws, and Naturalists may point to various instances of laws being moral or immoral to buttress the argument. The Positivistic attack on such an assertion goes something like this: although it may be the case that a law is moral (or immoral), it is logically fallacious, without more, to derive from this simple fact that all laws *ought* to be moral.<sup>138</sup> This is because, to be plain, the reasoning is nonsensical.

There is another line of reasoning intertwined in this riddle that one would do much good to untangle. The above line of reasoning results in a related fallacy that, I think, truly gets to the root of the contention between Positivists and Naturalists. I shall call this fallacy the Derivative Law, for it can be seen as a derivative of Hume’s Law. Just as a logical fallacy exists when one attempts to derive an ought from an is, a related fallacy (the Derivative Law) exists when one attempts to argue for what something is or is not by arguing for what it ought or ought not be. In other words, the Derivative Law stands for the proposition that one cannot explain/define/describe what something is (or is not) by instead explaining/defining/describing what that thing ought to be (or ought not to be). The two lines of argument are of a distinct kind, both in form

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<sup>136</sup> Hume *supra* note 22 at 469.

<sup>137</sup> See e.g. Hart-Positivism *supra* note 3.

<sup>138</sup> See generally *ibid.*

and substance. So, for example and as the Positivists would contend, it is mistaken to state that an existing immoral law is not a law simply because it ought to be moral. Naturalism, one might argue, is guilty of offending the Derivative Law for the law in the example exists, and it thus matters not whether one is able to proffer evaluative criticisms as to that law's moral merit. Now, whether or not the criticism is sound is one thing, but even if sound, it cannot take away the fact that the law exists.

The Derivative Law has important implications for not just legal theory, but also moral debate within legal theory, including implications with respect to the Tertiary Question. As one may remember from the introduction to this project, the Tertiary Question asks whether or not law has any necessary connection to morality. The question, like most of this type, suggests two potential answers: firstly, yes law does have a necessary connection to morality; or, secondly, no it does not. The two answers are opposed to one another, indicating a choice must be made between them. In legal theory, this line has been drawn and choices have been made, which is why we have Naturalists (those who answered yes) and Positivists (those who answered no). What I will demonstrate in PART II, however, is that the more fitting answer to this question is both yes *and* no. Naturally, objections at this point will be numerous and varied, for questions that spawn both yes *and* no answers are typically ones that also spawn paradoxical puzzles. The Tertiary Question appears no different in this regard, and in the introduction this puzzle was dubbed the Paradox – i.e. that law both does and does not have a necessary connection to morality. The Paradox, however, is illusory, and I will show why this is so through a reconceptualization of the is/ought dilemma, with that reconceptualization taking the form of the solutions to the Primary and Secondary Questions.



To help tease out the merits of this reconceptualization, I leave one, for now, with this.

The Primary Question = what is law? The Derivative Law teaches that it is incoherent to argue for what something is by instead arguing for what that thing ought to be. It follows that one cannot answer the question what is law by instead arguing for what it ought to be, moral or otherwise. But, I venture to posit, what if one answers the Primary Question with the following: law *is* the constant and consistent pursuit of what law *ought to be*. The answer to this question will bring about profound implications for the nature of law, will support answers to each of the Primary, Secondary, and Tertiary questions, and will ultimately reveal the power of law as dimensions.

## **PART II: LAW AS DIMENSIONS**

### Chapter 3: The 1<sup>st</sup>-Dimension of Law – Law as it Exists at any One Point in Time

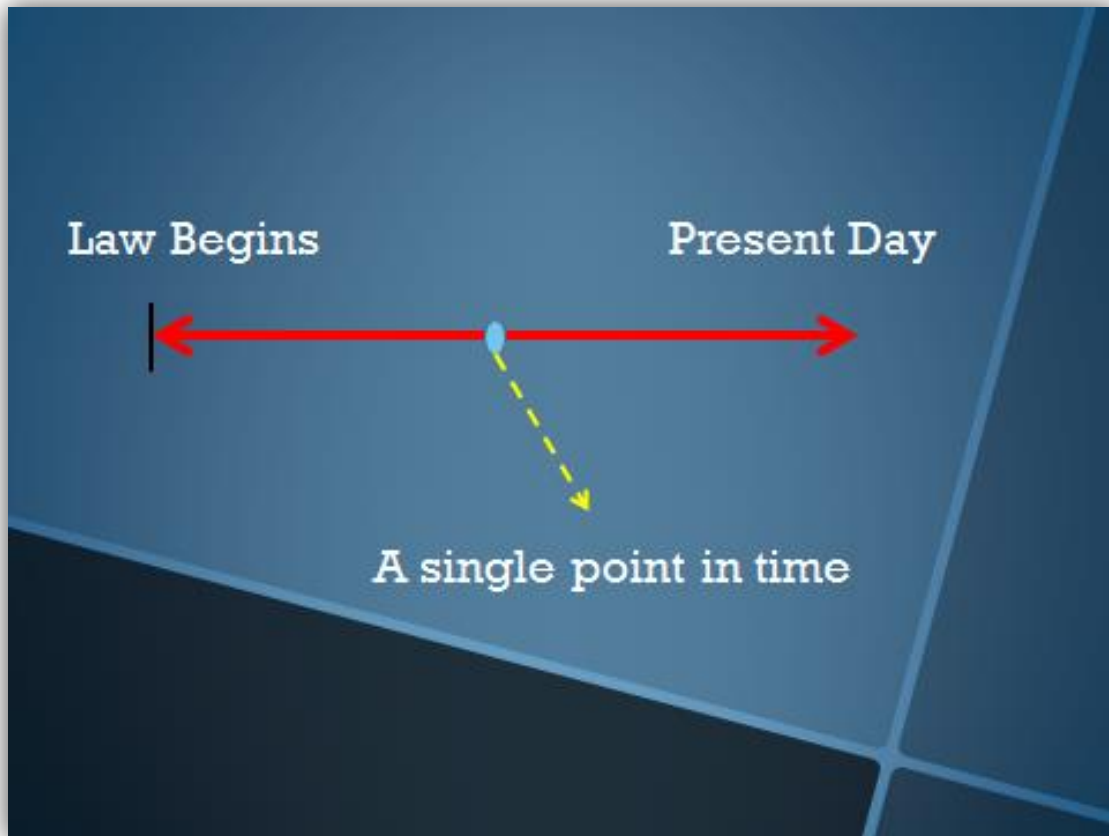


Fig 1

The goal throughout the first two chapters, being PART I, was to lay the foundation for the remaining three chapters, being PART II, the likes of which undertakes a dimensional analysis of law. The fundamentals that this type of analysis rests upon support the claim that law exists in three separate yet related time-based dimensions. In this chapter, I concentrate on the first of these dimensions.

Throughout PART I, I at times made reference to the fact that the foundational theses of Positivism, and more particularly the Social Fact Thesis, the Sources Thesis, and the Separation Thesis coalesce with the intrinsic properties of the 1<sup>st</sup>-dimension of law. Indeed, these theses integrate with the unique time-based element that corresponds to the 1<sup>st</sup>-dimension of law, with that time based element being the ‘point in time’. It is with this backdrop that I turn to discuss the various intricacies of the 1<sup>st</sup>-dimension of law, including why it is Positivistic in nature.

### 3.1 Gardner and Positivism as a Thesis

In Chapter 1, Positivism was understood as claiming to be a theoretical paradigm within the discipline of legal theory whose purpose it is to expound a complete theory of the nature of law. A theory of law as dimensions, however, takes Positivism not to be a complete theory, but instead to be one aspect of a more robust theory of the nature of law. In my view, it is useful in this regard to draw on the work of John Gardner, a self-identifying Exclusive Positivist,<sup>139</sup> as he makes an important concession regarding Positivism which supports the theory of law as dimensions.

In his *Law as a Leap of Faith*,<sup>140</sup> Gardner acknowledges an important limit of Positivism and the Positivistic theses.<sup>141</sup> The acknowledgment is found in one of the first chapters of the book, which is based on a previously published article titled “Legal Positivism: 5 ½ Myths”.<sup>142</sup> Gardner (I think correctly) concedes that Positivism is not and cannot be a complete account of the nature of law. In his words:

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<sup>139</sup> Gardner *supra* note 3 at 22.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid* at 33.

<sup>142</sup> *Ibid.*

Legal positivism is not a whole theory of law's nature ... . It is a *thesis* about legal validity [comprising a bundle of theses], which is compatible with any number of further theses about law's nature, including the thesis that all valid law is by its nature subject to special moral objectives and imperatives on its own.<sup>143</sup>

The concession is important, for it properly recognizes that Positivism is simply a thesis in and of itself, and not a theory of law *per se*. Its importance, therefore, to a more robust theory of the nature of law is directly related to what it, as a thesis, so claims. But, beyond these claims, the Positivistic thesis is largely sterilized, and other theses must therefore take over to more fully explain the nature of law. The true power of the concession is in full view once one is to be able to properly place the Positivistic claims, for example within a dimension, so that the placement illuminates not only the merit of the claims, but also the nature of law. Ultimately then, in order to flourish for all it is, Positivism would do well to be characterized as a thesis attributable to a dimension within a dimensional analysis of the law, and not a standalone account of the nature of law.

A second argument by Gardner, however, has potential to cause this project some trouble. Gardner includes as one of his 5 ½ myths of Positivism the claim that law has no necessary connection to morality.<sup>144</sup> In fact, he states that attributing this claim to Positivism is 'absurd' and that "[n]o legal philosopher of note has ever endorsed it as it stands."<sup>145</sup> Gardner states that,

[t]here are many... connections between law and morality... and [Positivists] have often taken great pains to assert them. Hobbes, Bentham, Austin, Kelsen, Hart, Raz, and Coleman all rely on at least some more substantial necessary connections between law

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<sup>143</sup> *Ibid* [emphasis added]. (Gardner also acknowledges that with this concession, one can be open to certain Naturalistic theses, such as Fuller's procedural account); see also John Finnis, "On Hart's Ways: Law as Reason and as Fact" in John Finnis, *Philosophy of Law* (New York, NY: Oxford University Press, 2011) in *Collected Essays*: vol IV [Finnis-*Philosophy*] at 239-246 (Finnis notes that Gardner, as well as other notable Positivists including Raz and Leslie Green, share this view).

<sup>144</sup> *Ibid* at 48-51.

<sup>145</sup> *Ibid* at 48.

and morality in explaining various aspects of the nature of law (although they do not all rely on the same ones).<sup>146</sup>

The argument is potentially troublesome because the basis of the Separation Thesis holds the exact opposite, meaning that there is no necessary connection between law and morality. The trouble, however, is quite easily averted once one understands the following: Positivism is simply a thesis and not a complete theory of law; the Separation Thesis as defined is part of the Positivistic thesis; and the Positivistic thesis is but one component of a complete theory of law as dimensions, with the 1<sup>st</sup>-dimension of law insisting on a necessary distinction between law and morality or, in other words, insisting that there is no necessary connection between law and morality. In understanding this, Gardner's claim, while true in a sense, is also misleading in another. The truth is that the Separation Thesis holds absolutely true in the 1<sup>st</sup>-dimension of law because from the vantage point of this dimension it is readily apparent that law has no necessary connection to morality. And because the 1<sup>st</sup>-dimension of law is Positivistic, the Positivistic claim that law has no necessary connection to morality is actually no myth at all. In the discussion that follows, the reasons for why this is so will become apparent.

### **3.2 The Separation of Law and Morality in the 1<sup>st</sup>-Dimension of Law**

One of the fundamental theses of Positivism is the Separation Thesis, an overview of which was undertaken in Chapter 1. Because the thesis is fundamental, it follows that if one is to claim that a dimension is grounded in Positivism, such as is the case for the 1<sup>st</sup>-dimension of law, it must be the case that the Separation Thesis holds true in that dimension. It thus falls on me to successfully argue that the Separation Thesis holds true in the 1<sup>st</sup>-dimension of law, and to aid in

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<sup>146</sup> *Ibid.*

making this argument, I will look to the work of the celebrated Positivist H.L.A. Hart for support.

As mentioned, in Hart's article "Positivism and the Separation of Law and Morals",<sup>147</sup> Hart famously argued that there is a necessary distinction between law and morality and, thusly, that there is no necessary connection between law and morality.<sup>148</sup> In making this argument, Hart used a combination of two different approaches. Firstly, he began by defending the positions of some key utilitarian proponents of the Separation Thesis, namely Jeremy Bentham and John Austin.<sup>149</sup> Secondly, he proceeded to moderate his argument by criticizing those identical proponents for advocating other flawed theses, most importantly Austin's command theory of law.<sup>150</sup> In approaching the argument in this way, Hart was able to point out a key distinction in certain criticisms of Bentham and Austin. Hart stressed that although the utilitarians had been criticized for what they claimed to be sound theoretical doctrines – criticism that even Hart, to an extent, agreed with – the critics nevertheless all made one fatal flaw.<sup>151</sup> Those critics, argued Hart, wrongly assumed that since one of the utilitarian doctrines could be proven to be false, it followed that all of the doctrines must also be taken to be false.<sup>152</sup> Logically, Hart's argument with respect to the flaw was certainly sound and I take no quarrel with it; however, the argument requires qualification with respect to how it relates to the Separation Thesis' connection to the 1<sup>st</sup>-dimension of law. That qualification is that the Separation Thesis can only *absolutely* hold true within the 1<sup>st</sup>-dimension of law. This follows from the fact that Positivism is simply a thesis itself attributable to this dimension.

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<sup>147</sup> *Supra* note 3.

<sup>148</sup> See generally *ibid.*

<sup>149</sup> *Ibid* at 602-03.

<sup>150</sup> See *ibid.*

<sup>151</sup> See *ibid.*

<sup>152</sup> *Ibid.*

The 1<sup>st</sup>-dimension of law is to be conceptualized as law as it exists at any one point in time. The 1<sup>st</sup>-dimension, in essence, is akin to taking a snapshot of the law as it exists along a time-based continuum. When conceptualized in this way, it becomes clear that law can only be explained for what it is and, conversely, cannot be explained by arguing for what it ought to be. This is because of Hume's Law and more specifically the Derivative Law, being that a logical fallacy is apparent in the reasoning of one attempting to explain what something is by instead explaining what it ought to be. This, in turn, accords with the Separation Thesis, because it separates arguments about what is from what (morally) ought to be.

In addition, when law is viewed through the 1<sup>st</sup>-dimension (i.e. at any one single point in time), it is clear that law and morality do not necessarily coincide. Hart himself provided the useful example of laws that have allowed for the ownership of slaves.<sup>153</sup> Such laws are not considered moral, yet they have nevertheless existed as valid laws.<sup>154</sup> Put another way, at various points throughout history, the state of the law has allowed for the ownership of slaves even though the act of owning a slave is generally considered immoral; and, in contrast, at other points in history, there have existed laws that prohibit the ownership of slaves and such prohibitions are generally considered moral. The state of law then, simply put, is the state of the law, and judgment as to the merits or demerits of any one law's moral content, in the 1<sup>st</sup>-dimension, does not affect that law's validity as law. It follows that Naturalism's Validity Thesis and NCT must be rejected in the 1<sup>st</sup>-dimension of law, for it would be logically incoherent to argue otherwise.

There are many other examples to make the point plain. Let us return to the example of segregation laws first noted in Chapter 2. It is clear that at certain points in time there were

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<sup>153</sup> *Ibid* at 606.

<sup>154</sup> *Ibid*.



segregation laws on the books of certain states in the United States.<sup>155</sup> These laws are generally considered immoral laws for they negatively affected racial minorities in a disproportionate way, resulting in what may be considered gross inequality. That said, even though the laws were immoral, they still existed as valid laws at the times they were in force. Eventually, however, these same laws were found to be unconstitutional,<sup>156</sup> and this outcome is generally considered to be moral, resulting in a more moral state of the law, but this fact does not negate the fact that there were, at other points in time, immoral segregation laws. In other words, the moral state of the law at one point in time cannot erase the fact that there was an immoral state of the law at other points in time (and *vice-versa*). The result is a necessary rejection of the Validity Thesis and NCT in the 1<sup>st</sup>- dimension of law, a dimension focused solely on law as it exists at any one point in time.

The above examples demonstrate that while at any single point in time there may be some intersections between certain laws and morality (e.g. the desegregation decisions and the movement towards increased equality being generally considered moral), such intersections will not necessarily be found between all laws and morality at other times. This is consistent with Positivism's Separation Thesis and, as will now be explained, both the Sources Thesis and Social Fact Thesis. Such is the nature of law in the 1<sup>st</sup>-dimension.

### **3.3 The Three Theses of the Positivism Thesis**

As has already been explained, the Sources Thesis and the Social Fact Thesis hold that all laws exist as social fact because they are brought into existence through social sources (e.g.

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<sup>155</sup> For example in the case of *Brown supra* note 133, the impugned segregation law was a Kansas law that separated blacks from whites for education purposes: see generally *Kansas General Statutes*, § 72-1724 (1949).

<sup>156</sup> *Brown supra* note 133.

legislatures, judges, etc.). Now, in a dimensional analysis of law, because of the element of time in the 1<sup>st</sup>-dimension of law (i.e. the point in time), the Social Fact Thesis and Sources Thesis may be combined to form a better representative thesis that I call the ‘Historical Fact Thesis’. This is because not only does law naturally flow from social sources, but it also exists, in the 1<sup>st</sup>-dimension, at any single *historical* point in time. When one takes a ‘snapshot’ of the law at any one point in time, one is taking a snapshot of the past and therefore a historical snapshot. The snapshot itself is coloured by both its social source and its historical nature. At the same time however, one cannot take a snapshot of the law in the future, or a snapshot of a future state of the law, as this would merely be an exercise in speculation or at best informed speculation. One may guess as to what any one law might be or what the state of the law may trend toward, and from this one may further argue the merits or demerits of that hypothetical law or the hypothetical state of the law – and to a certain extent, this is what legislatures in fact do – but the hypothesizing about what the law might be or arguing as to what the law ought to be is very different from identifying what the law is. Law is identified by reference to the social sources that create it and thereby solidify it as social and historical fact (this, again, was outlined in greater detail in Chapter 1).<sup>157</sup> Ultimately then, because existence of any fact is necessarily a historical inquiry, all laws when viewed through the 1<sup>st</sup>-dimension are historical as well as social and exist regardless of whether or not they are considered moral. Or, put another way, a law’s existence is one of social pedigree which manifests as historical fact, with issues as to that law’s moral characterization not affecting that law’s ultimate existence.

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<sup>157</sup> See e.g. Himma *supra* note 6 at 125 (Himma states that “The Social Fact Thesis asserts that the existence of law is made possible by certain kinds of social fact.”); see also Raz-*Authority supra* note 7 at 37-52 (Raz states that, generally speaking, the Social Fact Thesis is that “what is law and what is not is a matter of social fact...”).

Having said all this, I must unpack, I think, the idea of morality and moral characterization a bit more if one is to be able to more fully understand the nature of the 1<sup>st</sup>-dimension of law. It is true that one can characterize a law as either moral or immoral, but one cannot and does not know whether a law is moral or immoral in character unless and until one evaluates the moral merits of that law. Such an exercise engages in moral criticism and moral reasoning. One might argue that the ability to engage in such an exercise proves that, within the 1<sup>st</sup>-dimension of law, there is a necessary connection between law and morality, for if one is to understand whether a connection exists, one must first engage in moral reasoning. Such a belief, however, is misguided because the moral exercise is not attributable to the 1<sup>st</sup>-dimension of law. It is an exercise outside the dimension, forming aspects (as will be seen) of other dimensions. It must be emphasized that if an immoral (or a moral) evaluation is attributable to a law, one made pursuant to moral authority, such will have no effect on the *fact* of the law's existence. Indeed, such an evaluation is merely a characterization of the fact – and, of course, the fact of existence means the thing exists.

Any evaluation is potentially subject to change over time as one engages in re-evaluation. It follows that any characterization is also subject to this principle of transience. Therefore, our evaluations about (and our characterizations of) certain laws at any single point in time may be different as compared to another point in time. This is true, and is quite easily demonstrated by quick reference to the slavery and segregation examples above. But all of this does not change the underlying fact that law in the 1<sup>st</sup>-dimension of law has no necessary connection to morality. A distinction, of one sort or another, between the two remains. Moral criticism, reasoning, evaluation, and characterizations have a necessary connection to morality (and perhaps other

dimensions of law), but in the 1<sup>st</sup>-dimension of law they have no impact whatsoever on a law, the state of the law, or ultimately the nature of law in that dimension.

But this still is not the end of it. It is also of course true that laws typically change because individuals proffer arguments supported by reasons for change, and then applicable authorities choose to implement the change based on the supported arguments. Much of the time the reasons for change will be grounded in moral reasoning, using concepts of justice and injustice, and may be offered in support of a movement towards the greater good or an increased level of justice. Such being the case, one may be led to believe that because there are changes in the law at certain points in time that result from moral reasoning, it must follow that the 1<sup>st</sup>-dimension of law has a necessary connection to morality. This reasoning, however, would again be misguided. The processes by which the law changes and by which individuals influence changes do not form part of the 1<sup>st</sup>-dimension of law. Considerations of these changes are part and parcel of other dimensions of law. Again, the 1<sup>st</sup>-dimension of law is a micro-view of the law, with considerations of changes in the law being outside the scope of this view. In other words, changes to the law are not what one is concerned with when viewing the law through the vantage point of the 1<sup>st</sup>-dimension. This is not to suggest that such considerations do not inextricably link law to morality in another way. It indeed may, but such would no longer be a discussion of the nature of law in the 1<sup>st</sup>-dimension. It would be a discussion of a different type, to take place within a different dimension, pursuant to a different element of time. Again, the element of time that corresponds to the 1<sup>st</sup>-dimension of law is the element of the point in time. The 1<sup>st</sup>-dimension is therefore not concerned with changes in time, but is instead concerned with the social and historical fact of law, with each fact linking directly to a point in time. Therefore, while it is true that changes which are a result of moral criticism and moral reasoning do affect

certain dimensions (e.g. the 2<sup>nd</sup> and 3<sup>rd</sup> dimensions of law), they *do not* affect the 1<sup>st</sup>-dimension.

To blur the line between the dimensions would be to mistakenly conflate different components of the nature of law. This is an unnecessary obfuscation and, when the goal is to better explain certain phenomena (a goal this project shares), unnecessary obfuscation is to be avoided.

Ultimately then, such conflation is to be rejected.

### 3.3.1 Finnis and Law as Fact

The prior discussion led to the conclusion that law, in the 1<sup>st</sup>-dimension of law, exists as both social and historical fact. Additional support for this view is found in an article by the Naturalist John Finnis, which was recently republished in a collection of his works on the philosophy of law.<sup>158</sup> Finnis states:

[E]veryone knows that there have been and are – it's a matter of fact – rules laid down as laws, and described by makers and subjects alike as law, which were and are deeply unreasonable, unjust, immoral; it can happen that some of them do not even profess to be reasonable, just, or morally decent. ... As a matter of *fact*, there is no necessary connection between arguments and logic or validity as argumentation; arguments worthless as argument – as *reasons* for a conclusion – can be found all over the place. As a matter of *reason*, an invalid argument is no argument. Again, as a matter of *fact*, there is no necessary connection ... between law and reasonableness, justice or morality...<sup>159</sup>

Finnis can be seen here as accepting that law exists as fact, but as categorizing this fact as a special view of law. It is a factual view and a way by which one may describe law, but it does not necessarily explain a full account of the nature of law. Therefore, for Finnis, this factual component does no harm to a Naturalistic account of the nature of law, for it is a different type of account of the nature of law altogether. This makes sense and accords with a theory of law as

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<sup>158</sup> Finnis-*Philosophy supra* note 143.

<sup>159</sup> *Ibid* at 241-42.

dimensions, for the theory makes room for both Positivist and Naturalistic theses (as well as Pragmatist theses). It makes such room by recognizing various layers of dimensions, and then properly restricting the paradigms and their fundamental theses to their particular dimension.

### **3.4 The Relationship between the Separation Thesis and the Other Dimensions**

Having discussed the three fundamental theses of Positivism and their relationship to the 1<sup>st</sup>-dimension of law, more may be said on the relationship between the Separation Thesis and the other two dimensions of law.

#### **3.4.1 The Separation Thesis and Its Relationship to the 2<sup>nd</sup>-Dimension of Law**

Although the 2<sup>nd</sup>-dimension of law will be discussed more fully in Chapter 4, it will prove useful at this point to discuss how the Separation Thesis relates to it. In particular, it will be useful to see how the Separation Thesis is actually a natural consequence of the nature of law in the 2<sup>nd</sup>-dimension of law, specifically the process of judicial decision making.<sup>160</sup> The 2<sup>nd</sup>-dimension of law is to be conceptualized as the time between two points in time or, more specifically for the purposes of this project, the time over which a case consisting of legal issues is adjudicated. During this time, judges engage Pragmatism to decide cases. Judges, however, are human beings and as human beings are certainly not infallible. Any one judge's decision at any one time may not always be morally sound, nor may that decision be considered by some to be moral in character. In addition, the content of the legal issues may be such that no moral decision is available for the judge. Nevertheless, while a judicial decision may at times be considered 'wrong' and/or 'immoral', or what one may call bad law or law that ought not to be

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<sup>160</sup> I make no distinction between the terms 'adjudication' and 'decision making'. I use them interchangeably throughout this process to fend off monotony.

followed, the decision itself will still be considered law (assuming, of course, a higher level court, if given the opportunity, chooses not to overrule that judge's decision and/or the legislature chooses not to pass legislation that nullifies the law following from that decision).<sup>161</sup> Now, if one were to take a snapshot of the law after one of these wrong/immoral decisions is handed down, the law at that specific point in time, viewed now through the 1<sup>st</sup>-dimension of law, would not have any connection to morality for it would be immoral in nature. Since the law in such a situation is separated from morality in the 1<sup>st</sup>-dimension of law, it follows that the Separation Thesis proves true for that dimension.

### **3.4.2 The Separation Thesis and Its Relationship to the 3<sup>rd</sup>-Dimension of Law**

It is instructive to note that the Separation Thesis *does not* hold true for this dimension. A more complete analysis of why this is so will take place in Chapter 5, but for now a few points should be made. The 3<sup>rd</sup>-dimension of law, defined as the time between law's very first existence and the ever changing present day, is essentially diachronic, meaning the 3<sup>rd</sup>-dimension of law consists of the entire spectrum of changes that occur with respect to the law over time. Such changes occur because individuals within a system of law critically assess the state of the law at any one point in time and then reason that because of identified deficiencies, the law ought to be changed in certain ways. When pursued, those changes are implemented with the goal of remedying deficiencies, thus converting what was once a position on what the law ought to be into a newly existent or changed law (i.e. a new state of what the law is). The process is then repeated in perpetuity. Therefore, because these individuals are constantly and consistently seeking out changes and attempting to implement changes to remedy deficiencies, in viewing

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<sup>161</sup> See Hart-Positivism *supra* note 3 at 612.

this pursuit from the 3<sup>rd</sup>-dimension (i.e. a view of the entire spectrum), law may be conceptualized as the constant and consistent pursuit of what law ought to be. Because the goal of the pursuit is to remedy any and all deficiencies, motivated by an inherent desire to create a system of laws that more closely reflects an ‘ideal’ state of law (i.e. a state that is wholly just and therefore wholly moral),<sup>162</sup> the overall *pursuit* may itself be considered a moral undertaking.<sup>163</sup> Therefore, because the pursuit is moral, morality pervades the 3<sup>rd</sup>-dimension of law and, consequently, in the 3<sup>rd</sup>-dimension of law the Separation Thesis must fail.

### 3.5 Conclusion

This chapter has been concerned with Positivism and the 1<sup>st</sup>-dimension of law. The key component of this dimension, the component that explains why the fundamental Positivistic theses are true within the dimension, is the element of time that corresponds to the dimension: i.e. the point in time. When law is viewed at any one single point in time, the Social Fact Thesis, Sources Thesis, and the Separation Thesis make complete and absolute sense, hold absolutely true, and thus prevail over Naturalism’s Validity Thesis and NCT. As was shown, in the 1<sup>st</sup>-dimension of law, there is simply no necessary connection between law and morality. Law and morality in this dimension are distinct concepts. This is largely due to the fact that the

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<sup>162</sup> This concept will come to be known in Chapter 5 as the ‘General Goal of Legal Systems’ or the ‘General Goal’. In addition, one should note that I draw no meaningful distinction between the concepts of justice and morality in this project, nor do I draw any meaningful distinction between these concepts and their relationship to the phrase ‘what law ought to be’.

<sup>163</sup> It is prudent to stress that because of human fallibility, over any specific stretch of time the state of the law may actually travel further from or closer to the ultimate goal of being ideal. As such, the law as it exists at any one point in time may also be further from or closer to the ultimate goal of being ideal over these stretches. That said, although there may be digressions from the ideal path, it would be mistaken to conclude that the *overall* pursuit is therefore disconnected from morality. The more sophisticated a society gets, and the more that society properly uses hindsight to reflect upon prior states of the law, thus resulting in critical appraisals as to what the law now ought to be, the more the state of the law will connect to morality when such appraisals are translated into changes in the law. Ultimately, although human fallibility will preclude the actual achievement of the ideal state of law, as I will explain more fully in Chapter 5, it is the constant and consistent pursuit of that ideal state that is moral and that thereby provides the necessary connection between law and morality. It why law, in the 3<sup>rd</sup>-dimension, is Naturalistic.



Separation Thesis is dependent upon the element of time being the point in time. And it follows from this that because the point in time corresponds to the 1<sup>st</sup>-dimension of law, for the Separation Thesis to be absolutely sound, it must also be confined to the 1<sup>st</sup>-dimension of law. And so it is. This is why the Tertiary Question posed in the Introduction to this project, the one leading to the Paradox (that law does and does not have a necessary connection to morality) can be answered, in one respect, with ‘no’; because in the 1<sup>st</sup>-dimension of law, there is no necessary connection between law and morality. It is also why the solution to the Paradox is law as dimensions, because a dimensional analysis allows for a ‘no’ answer and, as one will later come to see, a ‘yes’ answer as well.

Having illuminated the nature of law in the 1<sup>st</sup>-dimension of law, it is now time to turn to the 2<sup>nd</sup>-dimension of law to explain how this dimension is fundamentally Pragmatic. This will require a change in vantage point from the point in time to the time between two points in time.

## Chapter 4: The 2<sup>nd</sup>-Dimension of Law – Law as it Exists between Two Adjacent Points in Time

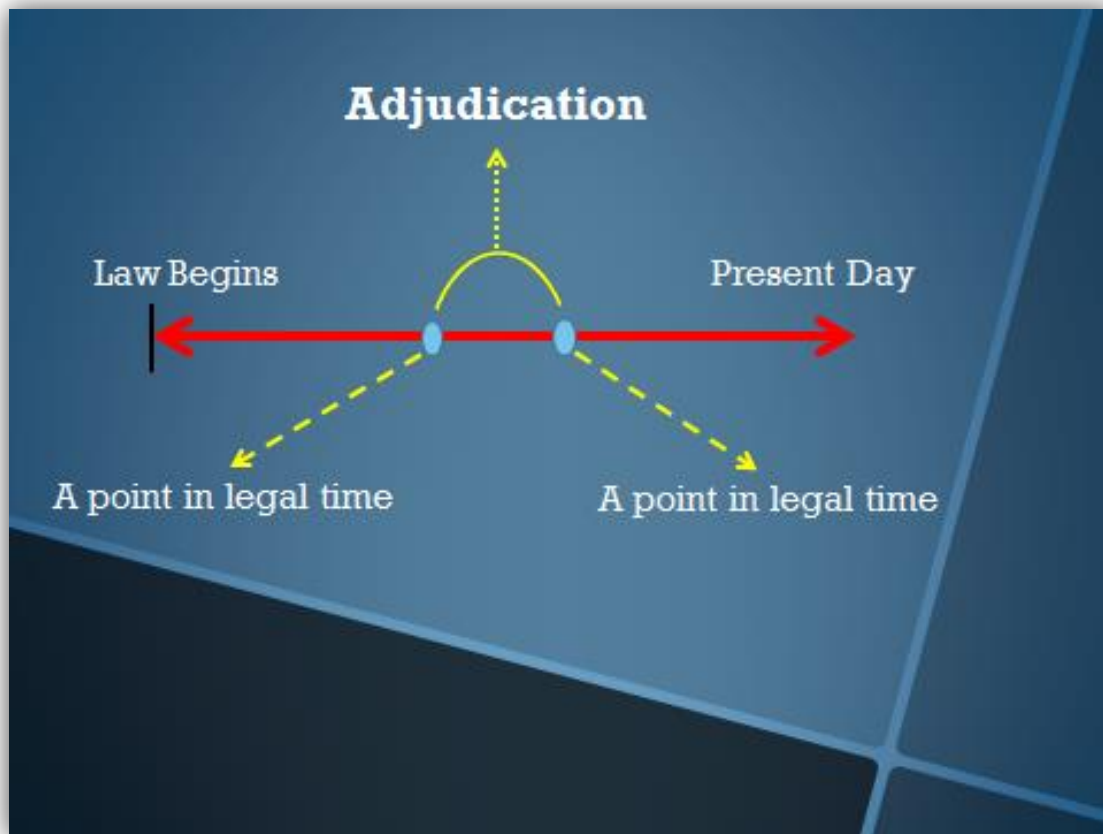


Fig 2

The 2<sup>nd</sup>-dimension of law is to be conceptualized as the time between two points in legal time or what can otherwise be referred to as the time over which a case with legal issues is adjudicated. Over the course of this chapter, I hope to demonstrate that due to the unique nature of our adjudicative systems, a phenomenon known as ‘legal binds’ occurs within the 2<sup>nd</sup>-dimension of law. It will therefore be important to discuss what is meant by a legal bind, how they manifest, how judges come to deal with them, and what judges ultimately do to dispose of

them. I will argue that a pragmatic approach, based in the Pragmatic theses, is the actual way by which judges decide legal issues, as well as the only way by which they may sufficiently decide legal issues. This, in turn, provides the reason why the 2<sup>nd</sup>-dimension of law is best explained and characterized by Pragmatism.

#### **4.1 The Double Bind and Multiple Bind Scenarios**

Two concepts central to the 2<sup>nd</sup>-dimension of law are the concepts of the double bind and the multiple bind. It will be instructive then to begin with a discussion of these concepts. In Chapter 1, it was noted that Radin discusses a concept known as the double bind with respect to feminist theory.<sup>164</sup> Generally, a double bind occurs in feminism whenever there are competing social policies from which one must choose and yet no matter which policy is chosen, harm occurs. Radin discusses the double bind as it pertains to the commodification of the sexuality of women.<sup>165</sup> She argues that due to oppression, both the “[c]ommodification and noncommodification of [the sexuality of women] may be harmful”.<sup>166</sup> This is due to the fact that commodification treats women as exchangeable goods, which is a threat to their personhood, and that noncommodification “[d]enies women the choice to market their sexual... services...”, which is also a threat to their personhood.<sup>167</sup> Radin argues, in taking recognition of this reality, that the best way choose amongst the various alternatives (i.e. the best way to resolve the issue of the double bind), is to engage Pragmatism.<sup>168</sup>

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<sup>164</sup> Radin *supra* note 103 at 1699-1704.

<sup>165</sup> See *ibid.*

<sup>166</sup> *Ibid* at 1700.

<sup>167</sup> *Ibid.*

<sup>168</sup> See generally *ibid.*

Radin does not necessarily make the broader claim that double binds also occur in law with respect to legal decision making. Indeed, her point is that double binds are pervasive throughout women's issues due to oppression.<sup>169</sup> Notwithstanding this more narrow application, a broader claim can and must be made. The double bind is not exclusively a feminist issue. There are also 'legal double binds' and 'legal multiple binds' that pervade all decision making processes with respect to the law. While Radin asserts that the feminist double bind arises from oppression,<sup>170</sup> legal double and legal multiple binds arise from the fact that our legal system is adversarial in nature. And, more specifically, the binds result from the unique reasoning that can be attributed to the lawyers functioning within such systems. These assertions will be defended throughout this chapter, beginning with the assertion that there is something unique about the reasoning of lawyers. With this in mind, I turn to analyze the legal reasoning of lawyers, how that reasoning may be contrasted with that of judges, and its importance to the nature of law.

#### **4.1.1 Hart's Problems of the Penumbra and the Legal Reasoning of Lawyers**

The time is ripe to return to Hart's 'Core/Penumbra' Thesis, a thesis that was briefly touched upon in Chapter 1. Hart first presented the thesis at the esteemed Oliver Wendell Holmes Lecture at Harvard University in 1957.<sup>171</sup> The lecture is noted as being the primer to the now famous Hart/Fuller debate.<sup>172</sup> Hart further elaborated on the Core/Penumbra Thesis in what

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<sup>169</sup> *Ibid* at 1700-701.

<sup>170</sup> *Ibid* at 1700.

<sup>171</sup> The lecture was later published in the Harvard Law Review: Hart-Positivism *supra* note 3; See also Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (New York, NY: Oxford University Press, 2004) at 196-202 (Lacey offers a biographical account of the lecture, including the circumstances surrounding the lecture and the events that unravelled thereafter).

<sup>172</sup> Fuller provided his criticism of Hart's lecture in his article Fuller-Fidelity *supra* note 3. He also critiqued Hart's view of the nature of law in Fuller-Morality *supra* note 73 at 133-45. For his part, Hart responded to Fuller's *The Morality of Law* via book review: "Lon L. Fuller: *The Morality of Law*" in HLA Hart, *Essays in Jurisprudence and Philosophy of Law*, (Oxford, UK: Clarendon Press, 1983).

is considered one of the most important books ever written on the topic of legal theory, *The Concept of Law*.<sup>173</sup> Through both of these publications, Hart was able to, amongst other things, bring to the forefront of legal theory a novel and persuasive concept known as the Core/Penumbra Thesis. With this context, let's revisit the thesis.

#### 4.1.1.1 Revisiting the 'Core/Penumbra' Thesis

Hart's Core/Penumbra Thesis was devised as a response to two separate and, in a sense, polar opposite schools of theoretical thought: Legal Realism and Legal Formalism.<sup>174</sup> On the one hand, Legal Realism maintained the notion that legal rules are ultimately indeterminate in nature, and that a consequence of this fact was that law itself is an indeterminate enterprise.<sup>175</sup> On the other hand, Legal Formalism asserted that law is wholly determinate and, as such, all legal disputes could be settled by logical deduction from applicable and determinate legal rules.<sup>176</sup> For Hart, although each theory seemed helpful in parts, neither one was plausible as a whole. He therefore refused to accept either of them on their merits. In the words of Hart, "Formalism and [Realism]... are great exaggerations, salutary where they correct each other, and the truth lies between them."<sup>177</sup> Hart set out to find this 'truth', with a goal of articulating a more reasonable and middle ground approach to an explanation of the nature of law.

As a setup to the Core/Penumbra Thesis, Hart stressed the undeniable existence of one key aspect of human language and, consequently, of legal rules in general. He stated that words

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<sup>173</sup> *Supra* note 6 at 124-54, 238-76.

<sup>174</sup> See generally *ibid* at 124-54; see also Hart-Separation *supra* note 3 at 606-15.

<sup>175</sup> See generally Hugh Collins, "Law as Politics: Progressive American Jurisprudence" in Penner et al *supra* note 4 at 279 (Collins offers a more in-depth discussion of Legal Realism and the theory's more modern complement, the Critical Legal Studies movement, proponents of which are known as the Crits).

<sup>176</sup> See generally Martin Stone, "Formalism" in Coleman & Shapiro *supra* note 4 at 166-205 (In this essay, Stone provides more full account of Legal Formalism).

<sup>177</sup> Hart-CL *supra* note 7 at 147.

and (since words combine to form legal rules) legal rules are “open textured”<sup>178</sup> in nature, meaning that they have a level of necessary generality.<sup>179</sup> In noting this, Hart was forced to partially concede to the Legal Realists that the determinacy of legal rules (and the various words found therein) is necessarily limited because all legal rules contain some element of indeterminacy due to the indeterminacy of words.<sup>180</sup> Hart labelled such indeterminacy a legal rule’s “penumbra of uncertainty”.<sup>181</sup> Committing to a penumbra of uncertainty was only a partial concession because Hart refused to concede that such uncertainty rendered legal rules wholly indeterminate, especially with respect to their application. In fact, Hart carefully and with subtlety pointed out Legal Realism’s mistake of pushing the idea of indeterminacy into excess.<sup>182</sup> Hart asserted that despite the fact that legal rules will intrinsically have a penumbra of uncertainty attributable to them, legal rules will nevertheless always contain a “core of settled meaning”.<sup>183</sup> For Hart, the distinction between the core and the penumbra of a legal rule could be explained as follows:

If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behaviour be regulated by rules, then the general words we use... must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case.<sup>184</sup>

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<sup>178</sup> Cf Waissman *supra* note 27 (Neil MacCormick notes that Hart derived his arguments pertaining to the open texture of language from the work of Waissman: see Neil MacCormick, *H.L.A. Hart*, 2d ed (Stanford, CA: Stanford University Press, 2008) at 211, n 21).

<sup>179</sup> See Hart-CL *supra* note 7 at 127-28; see also Hart-Separation note 3 at 606-09.

<sup>180</sup> See *ibid* at 607.

<sup>181</sup> Hart-CL *supra* note 7 at 123.

<sup>182</sup> Hart-Positivism *supra* note 3 at 607

<sup>183</sup> *Ibid*.

<sup>184</sup> *Ibid*.

Hart's point is that although one may not be able to formalistically apply, and therefore determine the outcome of, a legal rule in *every* case due to the fact that there is the possibility of indeterminacy that results from a rule's penumbra of uncertainty, *in the majority of cases*, a legal rule's core of settled meaning will provide for a logically determinate outcome.

Drawing upon a famous example first articulated by Hart helps illuminate the point.<sup>185</sup> Suppose that there is a legal rule that states 'No vehicles shall be allowed in the Park!'. The word 'vehicle' in this example is open textured and general, for it could take on a variety of different meanings. Hart emphasized the open textured nature of the word 'vehicle' when he stated that the word, and consequently the core of settled meaning of the rule, would plainly include within its scope "[a]n automobile, but what about bicycles, roller skates, toy automobiles? What about aeroplanes? Are these, as we say, to be called 'vehicles' for the purpose of the rule or not?"<sup>186</sup> A judge attempting to determine an answer to such questions would therefore, according to Hart, be dealing with "problems of the penumbra" and would need to use *rational discretion* (as opposed to pure logical deduction) in order to determine whether or not the legal rule *ought* to incorporate the penumbral case in issue.<sup>187</sup> With regards to rational discretion, Hart was of the view that it could not be logically deductive because "[l]ogic is silent on how to classify particulars... and this is the heart of a judicial decision."<sup>188</sup>

Hart's example is a general one and, I think, sufficiently establishes the main gist of the Core/Penumbra Thesis. Nevertheless, to help drive the point home, it will be beneficial to proffer one more example to assist in contextualizing the point. Let's once again return to the segregation example discussed in Chapters 2 and 3.

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<sup>185</sup> See *ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> See *ibid* at 608.

<sup>188</sup> *Ibid* at 610

The segregation example is rooted in the concept of (de)segregation in United States constitutional jurisprudence. The main issue in the segregation cases was whether the word ‘equal’ in the Fourteenth Amendment of the United States’ Constitution (also known as the Equal Protection Clause) allowed for the notion of segregation. In one of the first landmark decisions of the United States’ Supreme Court dealing with the Equal Protection Clause – the decision of *Plessy v. Ferguson*<sup>189</sup> – the Court held that the word ‘equal’ indeed allowed for segregation, meaning that the government could separate races of people so long as it provided the same services to those races in their place of segregation. The decision resulted in the articulation of the infamous (and now overruled)<sup>190</sup> ‘separate but equal’ doctrine. This doctrine held that so long as the separate public services that are established by the government for each race are equal in quality, there would be no violation of the Equal Protection Clause.<sup>191</sup> The underlying reasoning was that the choice to have such services be separate by race was a matter of public policy and therefore not necessarily one of law.<sup>192</sup> As Justice Brown speaking for the majority opinion in *Plessy* stated:

The object of the [Equal Protection Clause] was undoubtedly to enforce equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.<sup>193</sup>

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<sup>189</sup> 63 US 537 (1896) [*Plessy*].

<sup>190</sup> See generally *Brown supra* note 133.

<sup>191</sup> *Plessy supra* note 189.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*



Early decisions such as *Plessy* (and even later decisions such as *Brown v. Board of Education*<sup>194</sup>) demonstrate that the word ‘equal’ in the U.S. Constitution has both a penumbra of uncertainty as well as a core of settled meaning. It is clear from the jurisprudence that ‘equal’ includes equal in quality. It may therefore be assumed that any service that is unequal in quality would be unconstitutional. It follows that the core of settled meaning for the word ‘equal’ would include equal in quality. At the same time, the word equal has a penumbra of uncertainty as well. In *Plessy*, and later on in *Brown*, the Court was tasked with determining whether the idea of segregation (and desegregation) was included within the penumbra of alternative meanings that ‘equal’ might encompass. The uncertainty in these cases clearly lived up to its label, for early on in *Plessy* ‘equal’ did include segregation, while later on in *Brown* ‘equal’ clearly did not.

#### **4.1.1.2 Refocusing the ‘Core/Penumbra’ Thesis**

As the discussion in the last section typifies, there is a trend (or perhaps better labelled, a staple) in legal theory whereby theorists set out to explain the nature of law by focusing on the role of judges, the judicial process, and the way by which judges think and reason.<sup>195</sup> Hart’s presentation and explanation of the Core/Penumbra Thesis is no different in this regard. This, I believe, is an unfortunate mistake. The decision making process with respect to the law involves more than just judges and, in fact, its foundation rests upon the reasoning of lawyers. While it is true that at times theorists do discuss the role of lawyers and how lawyers think, they *do not* tend to draw any meaningful distinctions between what lawyers do on the one hand and what judges do on the other, including how such a distinction might aid in illuminating a more complete

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<sup>194</sup> *Supra* note 133.

<sup>195</sup> See e.g. Dworkin-*Empire supra* note 73 (Dworkin is notorious for analyzing the nature of law from the point of view of judicial interpretation. In fact, in his view, the nature of law may only be properly explained by Interpretivism, which necessarily involves an analysis of how judges think).

account of the concept of legal reasoning and the nature of law.<sup>196</sup> Furthermore, while it is true that focusing on judges is an important and essential endeavour when explicating a theory of the nature of law, to solely do so is to only partially engage with the various concepts. In acknowledging the deficiencies of this history, I turn to refocus Hart's Core/Penumbra Thesis to explain how *lawyers* think and, more specifically, how lawyers engage in *legal* reasoning.

#### 4.1.1.2.1 Lawyers and Legal Reasoning

As alluded to above, because Hart explained the Core/Penumbra Thesis in the context of the adjudicative role of judges, he was forced to assert that rational discretion as opposed to deductive logic governs penumbral decision making.<sup>197</sup> Now, while Hart was correct in the sense that judges do find themselves facing penumbral type situations, he obscured the notion of the Core/Penumbra Thesis by failing to recognize that lawyers indeed use logical and deductive penumbral based reasoning. There is one main difference, however, between how lawyers function in penumbral situations as compared to judges: judges are forced to *choose* amongst competing – and much of the time polar opposite – legal arguments existing only within the penumbra of a legal rule, while lawyers, plainly, do not have the same type of choice.<sup>198</sup> Lawyers are bound by their duty to most effectively represent their clients, and this duty forces lawyers to present and advance arguments that best frame their clients' cases within professional

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<sup>196</sup> See e.g. *ibid* (Dworkin, in fact, seems to use the concept of a lawyer and the concept of a judge, at times, interchangeably. He does so in many of his publications including *Law's Empire*. However, to do so is to ignore key distinctions between the two that result from the adversarial nature of our legal systems). Others have written on the concept of legal reasoning as it pertains to lawyers, but not in the sense of how it differs from judges or how it affects the nature of law: see e.g. Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, MA: Harvard University Press, 2009).

<sup>197</sup> Hart-Positivism *supra* note 3 at 607-15.

<sup>198</sup> As will be further explained below, this choice may be one offered by the lawyer or some other logically deductive choice; the emphasis being on logically deductive. The lawyers will define the scope of the issue, while the judges, if they so choose, create a logically deductive line of reasoning (i.e. argument) within that delimited scope. Normally, however, if a judge is of the view that an issue has potentially been missed, that judge will typically ask that further submissions be made by counsel, thus introducing additional lines of reasoning.

and ethical limits. The lawyer is thus constrained in a different way as compared to judges. There may be choice for a lawyer amongst competing lines of argument as to which one is ‘best’ for a client in any given situation, but because the *direction* behind the overall argument never changes (i.e. the lawyer must argue based on the best interest of his/her client) the arguments are logically deduced therefrom. This is so regardless of whether the lawyer is dealing with a straight forward application of the core of a rule or with a legal rule’s penumbra of uncertainty.

In addition, a lawyer’s reasoning does not exist merely within the penumbra of a rule, but will interact by moving back and forth between the core and the penumbra. When engaging in *legal* reasoning, the lawyer may begin at the core of a legal rule and then logically deduce, if necessary, an ‘extension’ of the core with hopes that the judge will accept such an extension; or, the lawyer may counter a core extension argument by contracting the penumbra of uncertainty surrounding a legal rule to the extent necessary to place the penumbral alternatives outside that which the judge would consider within his/her discretion. These two types of reasoning – core extension and penumbral contraction – may also be used by lawyers in the reverse order. Depending on the needs of a client, the lawyer may begin by attempting to contract the penumbra of uncertainty while the opposing lawyer may counter such a contraction argument with an argument based on a core extension. Additionally, both lawyers may develop arguments based on competing core extensions. Again, the type of argument employed will be largely dependent on the best interests of that lawyer’s client.

Take for example the “No vehicles shall be allowed in the Park!” rule already discussed above, with the issue being whether or not a mother’s stroller is to be included within the ambit of the rule. Such a question would be of the penumbral type for a judge, and the judge would therefore be tasked with having to choose whether or not the stroller is a vehicle. From the

judge's perspective, Hart is correct in the sense that there is no way to logically deduce an answer to this question. This is because the judge will inevitably be faced with multiple competing lines of logically sound legal argument. Having said that, from the point of view of the lawyer, logical deduction is not only possible, but necessary. Suppose that Lawyer A is arguing in favour of the mother's position, i.e. that the stroller *is not* a vehicle and therefore *is* allowed in the park. Lawyer A will start with a premise (e.g. all vehicles are self-propelled and can be licensed) and through deductive reasoning (e.g. the stroller is neither self-propelled nor licensable) will reach a logical conclusion (e.g. the stroller is not a vehicle and therefore, according to the rule, is not prohibited from being in the park).<sup>199</sup> Lawyer A in this instance is engaging in penumbral contraction as s/he is attempting to limit the penumbral alternatives – the potential for indeterminacy – surrounding the word 'vehicle' so that it does not extend to include the stroller. If the judge accepts the argument, the core of settled meaning of the legal rule can be seen as gaining resistance to future core extensions due to the resulting precedent that the judge's decision will create.

Now, suppose on the other hand that Lawyer B is attempting to counter Lawyer A's argument with his/her own logical argument that the stroller *is* a vehicle and therefore *is not* allowed in the park. Lawyer B will start with his/her own premise (e.g. all vehicles have wheels and can carry passengers) and through deductive reasoning (e.g. the stroller has wheels and indeed carries babies as passengers) will reach a separate logical conclusion (e.g. the stroller is a vehicle and therefore, according to the rule, is prohibited from being in the park). This type of reasoning (core extension) results in an expansion of the overall ambit of a legal rule (e.g. the

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<sup>199</sup> It would be rather silly if I did not note at this point that such an example is overly simplified and that most cases can and normally do become much more complex, drawing on and relying on a variety of different particulars and authority in order to buttress the overall argument. That said, for the sake of simplicity and to make the point more plain, I will keep the particulars in my example (i.e. self-propulsion, the ability to be licenced, etc.) basic.

word ‘vehicle’ now includes within its meaning strollers), which ultimately extends and re-characterizes the rule’s core of settled meaning.

One can apply the same concepts to the segregation example as has been used throughout this project. In *Plessy*, the lawyer for the state may have begun with the premise that equal means affording each individual race the same quality of treatment and not making either race inferior to the other, and then argue that because the state is affording each race the same quality of treatment separately from one another (this being an exercise in deductive reasoning), the Equal Protection Clause is not infringed and the impugned law is therefore constitutional (i.e. a logical conclusion is reached). The state in this example is engaging in a type of penumbral contraction, as it is attempting to contract the ambit of the word ‘equal’ through argument pertaining to the notion of segregation. The word ‘equal’, the argument goes, only encompasses the idea of equal in quality of services, and not a broader concept such as more substantive equality. The lawyer for the plaintiff, on the other hand, would have engaged in a core extension. That lawyer, for example, may have begun with the premise that the word ‘equal’ includes equal access to services despite race, and then argue that because the railroad legislation in question segregated individuals based on race (i.e. and exercise in deductive reasoning), the Equal Protection Clause is infringed and the impugned law is therefore unconstitutional (i.e. a logical conclusion is reached).<sup>200</sup>

From the above, the following point is reached: only reasoning that consists of core extension or penumbral contraction may be labelled *legal* reasoning. Put more generally, legal reasoning is reasoning about the rules themselves as opposed to reasoning about facts or about

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<sup>200</sup> I again note that other lines of argument (quite likely much more sophisticated and nuanced than the ones I have outlined) likely were made. But it matters not the number or complexity of lines of reasoning. What matters is that each line will be logically deductive, beginning from an anchor (the client’s best interests) and progressing therefrom.

the straightforward application of facts to settled legal rules. It is a type of reasoning which is relatively unique to lawyers and that lawyers engage in on a regular basis in addition to other more ubiquitous types of reasoning.

This last point, being that lawyers do engage in other types of reasoning besides legal reasoning in their day to day practices, should be unpacked a bit more. To provide some contrast to the concept of legal reasoning, I turn now to compare legal reasoning with one other mode of more widely used reasoning, which I will refer to as fact-centred reasoning, in order to better emphasize the difference between legal and ‘normal’ reasoning.<sup>201</sup>

#### **4.1.1.2.2 Non Legal Fact-Centred Reasoning**

Lawyers engage in fact-centred reasoning when they argue about whether or not certain facts should be accepted as true by the trier of fact. This type of reasoning occurs almost exclusively at the trial level of adjudication for appellate level adjudication is more concerned with the implications of legal reasoning. Drawing on the ‘vehicle’ example above, instead of arguing about what is to be included within the scope of the word ‘vehicle’, lawyers might argue about whether or not the stroller was actually in the park by using, for example, the testimony of witnesses to establish the truth of such facts. Or, to use the segregation example from *Plessy*, the lawyers might argue about whether or not the plaintiff actually boarded and then refused to leave a ‘whites only’ train, and they may again use witnesses to establish such facts. Lawyers, however, are not the only individuals that engage in this type of reasoning. In truth, fact-centred

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<sup>201</sup> There are other modes of non-legal reasoning that lawyers and other individuals engage in and, therefore, the discussion that follows is not meant to be exhaustive. For example, reasoning by analogy is another type of reasoning that both lawyers and other members of society engage in on a regular basis. That said, when reasoning by analogy is with respect to a rule, such that it aims to expand the core of the rule or contract the penumbra, it is still a form of legal reasoning.

reasoning is appropriately viewed as being much more universal in nature as compared to legal reasoning.

A simple family household example should be enough to make the point. Suppose a household consisting of a set of parents and their child has a rule whereby the child must always be home by 10:00PM and if the child is not, the child is to be punished. Suppose further that the child attends a meeting with a friend at a restaurant downtown, and that on this occasion there is some ambiguity as to exactly when the child returned home, although the ambiguity is narrowed to a time between 9:50PM and 10:10PM. It is clear that the rule in this case, that the child must be home by 10:00PM, is settled and thus would not be debated by either the parents or the child. Instead, it is the *fact* of what time the child returned home that is of central importance to the dispute, and therefore this fact must be proven in order to properly determine the outcome of the case. If the child is able to prove that s/he returned home, for example, at 9:55PM (perhaps by witness testimony, suppose a credible neighbour that witnessed the child arriving home at that time), then according to a straightforward application of that fact to the settled rule, the child would not be subject to punishment because the child would have returned home by 10:00PM. If, however, the parents are able to prove that the child returned home at 10:05PM (perhaps by playing back the family surveillance video), then the child would be subject to punishment because, again, according to a straightforward application of the fact to the settled rule, the child would not have returned home by 10:00PM. In cases such as this, there is no reasoning *about* the actual rule that governs the situation and therefore no *legal* reasoning is engaged. Instead, the reasoning focuses on proving the truth of the claimed facts, which engages fact-centred reasoning.

For the sake of additional clarity, let us consider a slightly altered example. Suppose now that instead of attending a meeting downtown, the child attended a social gathering in a neighbouring town. Suppose further that the child returned to his/her *hometown* by 9:55PM, and subsequently returned to his/her *house* by 10:05PM, and that there is no dispute regarding any of these facts. Suppose that the parents punish the child for returning to the house after 10:00PM and that the child, appalled by such punishment, attempts to argue that s/he was under the belief that the word ‘home’ in the rule ‘one must return home by 10:00PM’ is open textured and therefore would logically include within its meaning the case of one returning to one’s hometown in accordance with certain particulars (e.g. the principle that the rule is meant to keep the child safe and that the hometown in question is known to be generally quite safe). The parents would surely dismiss this argument outright, for it would unsettle the core of the rule in question and would quite likely be considered an inappropriate ‘twisting’ of the rules of the house – although the parents may comment that because the child attempted to make such an argument, the child would be best to consider becoming a lawyer. As has been demonstrated, such a comment would be warranted because the type of rule-oriented reasoning that the child engaged in is best characterized as *legal* reasoning.

#### **4.1.1.2.3 Legal Reasoning and the Hard Case Conversion Process**

While the above clarifications regarding the Core/Penumbra Thesis, in the spirit of Hart, ‘disentangled’ many of the obscurities surrounding the distinction between how lawyers think on the one hand and how judges think on the other, more can be said regarding how this distinction influences the nature of law. The majority of this discussion will take place in the sections to follow, but to begin, I wish to explain how legal reasoning as discussed above is useful in



classifying what constitutes a ‘hard case’,<sup>202</sup> in determining whether ‘easy cases’ exist, and in identifying a phenomena within the nature of law known as the ‘hard case conversion process’.

A hard case has traditionally been defined as one where there is no clear answer to the legal dispute when considering the applicable law.<sup>203</sup> In other words, according to this definition, hard cases exist when a judge must engage with problems of the penumbra, thereby requiring that judge to use discretion in settling the legal issue(s) in dispute. Conversely, an easy case has traditionally been defined as one where the applicable law is clear and the judge’s role is simply to apply the facts of the case to that clear legal rule.

The traditional classifications, however, are not the only way by which easy cases and hard cases may be classified. The existence or nonexistence of the use of legal reasoning by lawyers may also be used to classify, and in my view is more helpful in classifying, these types of cases. As has already been seen above, it is clear that there are instances where a legal issue can be resolved according to fact-centred reasoning alone. This will occur when the scope of each applicable legal rule in a case is not called into question. In such cases, once the disputed facts are settled, those facts can be applied to the legal rule in a straightforward manner and the dispute can be logically and deductively resolved by the judge. It follows that when lawyers engage in *only* fact centered reasoning – or other types of more ‘normal’ modes of reasoning – *and not* legal reasoning, the case may be classified as an ‘easy one’. Conversely, if one or both of the lawyers in a case engage in legal reasoning, thus calling into question the scope of at least

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<sup>202</sup> See e.g. Ronald Dworkin, “Hard Cases” (1975) 88:6 Harv L Rev 1057 [Dworkin-Hard] (Dworkin discusses the intricacies involved with hard cases from an Interpretivist perspective); see also Dworkin-*Principle supra* note 89 at 119-45.

<sup>203</sup> A clear and recent example of a true ‘hard case’ is one of the Supreme Court of Canada in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457. The judgment contains two main sets of reasons that are diametrically opposed to one another.

one applicable legal rule, the lawyer(s) will necessarily create a hard case.<sup>204</sup> Ultimately then, when a case is viewed from the perspective of the judge, easy cases only exist when lawyers do not engage in legal reasoning.

Having explained the importance of the (non)existence of legal reasoning to a case's classification as either easy or hard, one might come to notice that lawyers have a sort of natural ability to convert easy cases into hard cases simply by engaging in legal reasoning. This, in fact, is true. The ability, once exercised, necessarily invokes, what may be termed, the hard case conversion process. Like legal reasoning, lawyers will choose to invoke this process when doing so is in the best interest of their clients' cases. Lawyers are deeply trained in seeking out ambiguity in legal rules and then ethically exploiting that ambiguity through legal reasoning in order to frame their clients' cases in the most favourable ways possible. These skills, in truth, encompass much of a law student's educational experience. Although judges must deal with the resultant penumbral problems, consisting of the binds that I turn next to discuss, it is the lawyers that play a central role, much of the time, in creating the overarching penumbral situation.

## **4.2 Legal Reasoning and the Bind Scenario**

At the beginning of this Chapter, I suggested that legal binds occur due to the fact that a legal system is adversarial in nature. Since each lawyer in an adversarial dispute is to, and indeed does, present his/her own competing line(s) of logical argument (or arguments), the result

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<sup>204</sup> One may query whether it is the lawyer that is creating the hard case or whether the case is inherently a hard one from the nature of the issues. It must be responded, however, that my argument is ontological in nature, while the objection is seemingly epistemological in nature. Therefore, the objection is misguided for it fails to engage the actual argument.

is a situation of a ‘legal double bind’,<sup>205</sup> or if there are more than two arguments presented, a ‘legal multiple bind’. The result is that the adjudication element of law, from the point of view of judges, turns out to be all about choice. Lawyers, through legal reasoning, create competing lines of argument.<sup>206</sup> The role of the judge is to decide which one of the competing lines of argument is to be accepted. In other words, the role of the judge is to choose, with the role being indicative of the concept of choice. This is the nature of adjudication, and thus the nature of a law in the 2<sup>nd</sup>-dimension of law.

To build upon this idea a little bit more, it will be instructive once more to revisit Hart and the Core/Penumbra Thesis. Hart suggests that legal actors, specifically judges, are at times *occupied* with problems of the penumbra, but are never (and should never be) *preoccupied* with such problems.<sup>207</sup> Unfortunately, however, this suggestion is somewhat misleading. On the one hand, and as discussed at length above, the Core/Penumbra Thesis *necessarily* preoccupies lawyers – indeed, the very essence of the lawyer (i.e. his/her unique ability to engage legal reasoning) is to be preoccupied with the problems of the penumbra. On the other hand, the Core/Penumbra Thesis does not preoccupy judges. Because a judge’s role is to choose between competing lines of legal argument, a judge is not preoccupied with problems of the penumbra at all. In fact, the Core/Penumbra Thesis at times may not even factor into a judge’s decision making process. Lawyers, in essence, act as a penumbral filter, narrowing the judicial choices and leaving judges with either a double bind or a multiple bind scenario. Judges will also question lawyers in oral argument in order to further refine the lines of argument and/or to

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<sup>205</sup> Cf Radin *supra* note 103 at 1699-1704. (As noted in Chapter 1, Radin discusses the concept of a double bind as it pertains to feminist theory and oppression. I have adopted the phrase ‘double bind’ here and have adapted it to the legal scenarios faced by judges in an adversarial system of law).

<sup>206</sup> These ‘lines of argument’ will be defined as first-order considerations to be discussed more fully below.

<sup>207</sup> Hart-Positivism *supra* note 3 at 615.

eliminate alternative lines of argument that exhibit logical shortcomings. The nature of what a judge must do then, once the competing lines of argument are established, is to basically choose one of the various arguments as being superior to the others. While Hart acknowledges that judges do make such choices in limited circumstances (i.e. only penumbral cases), the discussion above demonstrates this view to be mistaken. A judge will have to make such choices in *all* cases which involve lawyers that invoke legal reasoning. This is because of the resulting either legal double bind or legal multiple bind scenario,<sup>208</sup> or to put it another way, because the lawyer(s) chose to invoke the hard case conversion process.

An objection may be raised at this point. Why is it the case that only lawyers create competing lines of reasoning? Can a judge not create his/her own argument? This objection, however, is rather simple to overcome. It is admitted that judges have the ability and power to create their own competing lines of argument, but even if a judge chooses to derive and then add his/her own competing argument(s) to that of the lawyers' arguments (again, a path that the judge is free to embark on), that judge will only be contributing to the legal multiple bind scenario. The judge's argument will simply be placed amongst the lawyers arguments with the ultimate disposal of the issue still requiring choice amongst the field of choices.<sup>209</sup>

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<sup>208</sup> There are times when a judge may be faced with *no* competing lines of legal argument. For example, the legal issues might be fully settled, leaving only questions of fact for the judge. The arguments I make in this project assume that the judge is dealing with some sort of 'hard case' due to the lawyer(s) invoking the hard case conversion process. For one point of view on hard cases, see Dworkin-Hard *supra* note 202. What is important to remember is that, ultimately, any time a lawyer engages in legal reasoning, easy cases are converted into hard cases through the hard case conversion process.

<sup>209</sup> A further objection may be made to even this simple answer. Some may argue that if a judge chooses to create his/her own line of argument in any one case, that the judge will always end up choosing that very argument to be the ultimate solution. This skeptical objection, however, is misguided. Even though a judge may canvass a wide variety of different legal solutions, it does not necessarily follow that the judge will always prefer the argument that s/he placed amongst the arguments to be canvassed. A judge that chooses to create his/her own line of argument in addition to the solutions proffered by the lawyers is simply being a prudent judge; nothing prohibits a judge from being both prudent and pragmatic at the same time.

#### 4.2.1 First-Order Considerations

I have spoken of competing ‘lines of reasoning’ and competing ‘lines of argument’ interchangeably above. It will be useful, however, to provide a general label for this concept and to further define the nature of the concept. I will refer to the concept from now on as first-order considerations, for they are the considerations that the judge first considers.

First-order considerations are the lines of reasoning that lead to double or multiple binds. They lead to such binds because each first-order consideration, once compared, is equal in value to each other first-order consideration. The logic comprising any one first-order consideration is such that it provides a viable solution to the legal issue in question. At this level of analysis, it matters not which solution is chosen, but only that each solution is of equal value in the sense that each provides a solution to the issue.

For illustrative purposes, consider a comparison between logic and math. For math, if one was to take two different equations that provide a solution to a mathematical problem, it would be nonsensical to state that one equation has more value as math as compared to the other. It may be the case that one equation is simpler than the other in form, or that one is easier to work with, but as far as math goes, they both solve the mathematical problem and are therefore of equal value. Similarly, for a first-order consideration, the logic found therein is a way by which the legal problem may be solved and, therefore, the logic as logic is equal in value to the logic found in other first-order considerations that are also able to solve the legal problem.

The above helps explain why the 2<sup>nd</sup>-dimension of law adopts the MRAT of Pragmatism. As a refresher, the MRAT holds that in any one legal dispute, there will be multiple right answers. Because all first-order considerations are equal in value, it may be correctly stated that any one of them is ‘right’, and/or equivalently that each one is ‘right’. The ultimate result then is

a bind to be dealt with *via* choice; i.e. the judge will need to choose which first-order consideration is best. But this merely begs the question: how is a judge to determine which first-order consideration, each being equal in value from the viewpoint of logic, is best? The answer, I suggest, is found in Pragmatism.

### **4.3 Pragmatic Decision Making**

Because Pragmatism is central to the decision making process, and because the 2<sup>nd</sup>-dimension of law is to be understood as the time over which a case is adjudicated, it follows the 2<sup>nd</sup>-dimension of law is properly characterized by Pragmatism. This section will discuss what is meant by Pragmatic decision making. But before engaging directly with Pragmatism, including the idea of second-order considerations, it will be instructive to provide a critique of one of the leading views of adjudication explained in Chapter 1, that being Dworkin's Interpretivism. Indeed, in my view Dworkin's Interpretivism provides a useful contrast to Pragmatic decision making. In being armed with the concept of binds, I hope to show why Dworkin's view is somewhat misguided, and in demonstrating this I hope to clear the way for a fresh and hopefully more accurate view of judicial adjudication.

#### **4.3.1 Dworkin and Interpretation**

Dworkin argues that the identification and application of moral principles is *always* required when legal issues are adjudicated.<sup>210</sup> It would necessarily follow from this that moral principles and morality pervade the 2<sup>nd</sup>-dimension of law. But such reasoning, unfortunately and with great respect, is mistaken. As I will discuss below, although a version of what one may call

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<sup>210</sup> See generally Dworkin-Ambition note 74. (I will refer to this article mostly, though in Chapter 1 I also made extensive reference to Dworkin's seminal work in this regard, *Law's Empire*).

principle is indeed considered (necessarily) in judicial adjudication, it would be misleading to conclude that this somehow characterizes the heart of judicial adjudication as that of interpretation. It must be remembered that the solution to binds is choice, not interpretation. While interpretation, in a sense of the idea, is used to create first-order considerations, interpretation is not determinative of choice between first-order considerations.

Dworkin's argument that morality pervades adjudication is troublesome for another reason. It posits that judges, in essence, must preoccupy themselves with morality, moral principles, and moral reasoning. Not only is this, in my view, impractical, it is also unnecessary and ill-fitting as to what judges actually do. A judge is not an ethicist, but instead a human individual trained in law that is attempting to decide which first-order consideration out of a set of first-order considerations is best considering the information available. A judge therefore exists purely to make the best choice amongst *legal* alternatives, regardless of if that choice is moral and/or morally principled. As was explained in Chapter 1, this is the Best Choice Thesis, a thesis fundamental to Pragmatism and pragmatic decision making.

#### **4.3.2 Second-Order Considerations - Principle, Practicality, and Weight**

Second-order considerations are those considerations that assist judges in discriminating between first-order considerations. They are considerations that lend weight to the various first-order considerations and thus allow for any one choice to not be random in nature. The two second-order considerations that lend weight are what may be called 'principle' and 'practicality'. In the end, it is the accepting, rejecting, or balancing of these second-order considerations that results in a judge choosing a specific first-order consideration, and with that choice being 'best'.

It is important to clarify what I mean by the terms principle and practicality. I will begin with the concept of principle. Dworkin's concept of principles involves the cataloguing and application of a myriad of different moral considerations, using them as interpretive devices. In contrast, when I speak of principle, I use the term in a more primitive sense. Principle is the immediate emotional (and 'moral') response that a judge has to any one first-order consideration.<sup>211</sup> It may be subtle or evident, appropriate or misguided, weak or strong; but in any event it will always be present, though not always in the end given effect. Another feature of principle is that it is supplemented by reason; it arrives first, is *a posteriori* in nature, and is supplemented by reason. Principle, as defined and used in this project, is not an automatic justification of first-order considerations, but instead an emotional response in the absence of immediate reason, at least at first instance. It is that 'this just *feels* wrong' or 'surely this is the *right* thing to do' etc. response that one experiences after coming to understand a first-order consideration. In addition, it is a characteristic of principle that it has potential to lend weight to a first-order consideration and/or against considerations of practicality.

Practicality, on the other hand, is comprised of the consequences that flow from a first-order consideration. As was explained in Chapter 1, the consequences are the effects that will occur in the future as a result of any one choice. So while principle is an emotional response supplemented by reason, practicality may be seen as considerations that supplement reason.<sup>212</sup> Like principle, practicality also has potential to lend weight for or against a particular first-order consideration and/or for or against a particular principle.

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<sup>211</sup> Cf Daniel Kahneman, *Thinking, Fast and Slow* (Toronto, ON: Doubleday Canada, 2011) (Kahneman discusses two types of thinking, fast and slow thinking. My concept of principle somewhat resembles that of fast thinking, a type of system our minds utilize. It "operates automatically and quickly, with little or no effort and no sense of voluntary control").

<sup>212</sup> Cf *ibid*; see also Posner *supra* note 103 at 40.



The Best Choice Thesis (which can now be defined as a judge's choice of which first-order consideration is best in any one legal dispute) is dependent on second-order considerations. As mentioned, these second-order considerations lend weight to first-order considerations, with the first-order consideration that is given the most weight pursuant to the second-order considerations being the one of choice for the judge. Principle and practicality may work in unison, or may work against one another. For example, it may be the case that the emotional response to a first-order consideration is "this is just wrong", and the practical considerations are such that the first-order consideration would create enormous inefficiencies and be unworkable in practice. The result is that the particular first-order consideration would be given very little weight and would almost surely be rejected. On the other hand, it may be the case that the "this is just wrong" decision is one that makes good practical sense, or that the practical situation flowing from the "this feels right" decision would be inefficient and unworkable. In such cases, the judge would weigh these second-order considerations which in turn would affect the weight conferred upon the first-order consideration that resulted in the 'weight opposed' second-order considerations. Ultimately, the judge will go through this process for each first-order consideration and then choose the first-order consideration that is conferred the most weight. This first-order consideration then will be the 'best choice' amongst the other first-order alternatives.

It follows from the above that in any one case, the best choice may be one based wholly on principle (when practicality is wholly rejected), one based wholly on practicality (when principle is wholly rejected), or one based on both practicality and principle (when the two align). Therefore, in any one case, the choice may be moral or practical, or a combination of both. But it is not and cannot be the case that in every case the ultimate decision is one justified

by principle. This is because principle is but one second-order consideration and it may be rejected for that of practicality, another second-order consideration.

#### **4.3.2.1 Precedent – A Unique Consideration**

The discussion thus far has not directly engaged with an important aspect of law, that being precedent. A complete discussion of precedent, however, would be tangential and therefore I do not intend to explain its various intricacies here.<sup>213</sup> Instead, it will suffice to develop a few arguments with respect to how precedent affects judicial adjudication and how precedent is both a first-order consideration and a second-order consideration.

By precedent I mean the rules that are *prima facie* binding on judges or persuasive to judges. Such precedent is unique in the sense that it may be both a first-order consideration and/or a second-order consideration. On the one hand, the logic within the precedent, assuming it is not fallacious, is an established first-order consideration. As such, it will be included amongst the other first-order considerations for the purposes of adjudication. On the other hand, precedent is also a second-order consideration because it provides weight to applicable first-order considerations. The strength of the weight will be dependent upon the level of court the precedent originates from, with the strength comprising a spectrum from weak to near absolute. But this is not the only weight the precedent will have. There will also be second-order considerations of principle and practicality with respect to that precedent in the context of the legal issues currently before a judge. If either the principle or the practicalities inherent in the precedent lead to an unpalatable result for the current case, the precedent will be distinguished on

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<sup>213</sup> For an enhanced discussion on the concept of precedent, see generally Debra Parkes, “Precedent Unbound? Contemporary Approaches to Precedent in Canada” (2007) 32 Man LJ 135; see also Adryan J.W. Toth, “Clarifying the Role of Precedent and the Doctrine of *Stare Decisis* in Trial and Intermediate Appellate Level *Charter* Analysis” (2013) 22 Dal J Leg Stud.

the facts or, if the appellate court has the power to so do, will be overruled. Similarly, if the principle and practicalities lead to a palatable result, the precedent will add additional weight to the applicable first-order consideration(s).

One other aspect of precedent should be discussed. This aspect draws on Raz's concept of pre-emptive reasons as outlined in Chapter 1.<sup>214</sup> The special institutional nature of precedent is such that it both post-empts and pre-empts second-order considerations. More specifically, the nature of precedent is such that it post-empts principle and pre-empts practicality. Precedent acts to limit these second-order considerations and is thus somewhat scope defining. That said, the ability of precedent to maintain its status as such is directly proportionate to a judge's own second-order considerations with respect to that precedent. Therefore, if the second-order considerations weigh in favour of distinguishing the precedent, the precedent will be distinguished and it will lose its pre-emptive and post-emptive status. Or, if the second-order considerations weigh in favour of reinforcing a first-order consideration, then the precedent will lend additional weight to that first-order consideration in a pre-emptive and/or post-emptive fashion, thus eliminating certain other first-order considerations and, potentially, the underlying bind.

#### **4.3.1 Planning and Judicial Adjudication**

A small semi-digression is in order before this chapter concludes. As mentioned in Chapter 1, Shapiro, based on his own in-depth research, concludes that human beings are planning creatures.<sup>215</sup> As such, one might argue that since judges are human beings and since

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<sup>214</sup> Raz-*Authority supra* note 7 at 17, 22-23, 26-27, 32-33; Raz-*Practical supra* note 42 at 35-48; Raz-*Morality supra* note 42 at 57-62.

<sup>215</sup> See generally Shapiro-*Legality supra* note 13

human beings are planning creatures, that judges must therefore create plans in the form of jurisprudential laws that result from their adjudicative processes. I think this argument, however, is somewhat misleading. A judge as a planning creature does ‘plan’, but the planning is quite limited.<sup>216</sup> Judges, in a sense, plan to dispose of the legal issues before them, but this is also more of a duty. The only plan that may be seen is that of gathering the applicable first-order considerations and applying the second-order considerations such as to bring about reason for choice. Therefore, the ultimate plan is to choose and the business of the judge is that of choice. It is not the business of the judge to develop complex plans that may be needed to support and/or advance a society. Indeed, judges may hear submissions that ring of good public policy, but engaging public policy, as understood by judges, is something best left to the legislature. A competent judge will always be mindful of the consequences that follow from any one choice and then take those consequences into consideration; indeed, this has already been identified as the second-order consideration of practicality. But to then say that the judge is engaging in complex planning would be misleading and ultimately mistaken. Again, a judge chooses and re-chooses over time. A judge’s duty is to dispose of the legal issues in the case that is before him/her at that specific time. Therefore, the judge, as a human being (i.e. planning creature) must plan to dispose of the case. The tool by which s/he does so is Pragmatism, understood as the interplay between first-order considerations and second-order considerations. While it is true that the results of these choices might, over time, resemble a plan, they are not a result of planning for *that* resulting plan *per se*. If a judge were to engage in such planning, that judge would be engaging in complicated public policy, which again is not the business of the judge. Such complicated public policy decisions are the business of the elected officials of a society. In

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<sup>216</sup> In Chapter 1, I noted that Shapiro does acknowledge this limitation: see *ibid* at 198.

any event, the discussions in this chapter show that the nature of adjudication is such that this type of planning cannot and does not occur, and any notion of judges engaging in public policy through planning is thus mistaken.

#### **4.4 Conclusion**

The arguments in this chapter resulted in a rejection of Dworkin's model of adjudication, that of Interpretation, and an embrace of Pragmatism, for Pragmatism better models that which judges actually do. An implication of this was that any one decision need not be moral. One may thus find it necessary to argue that since the individual changes in the law need not be moral, that law as a concept must be separated from morality. This argument misses an important point, one I should expand upon now as prelude to Chapter 5. While it is true that any one legal decision need not be grounded in moral principle, or considered moral in result, it does not necessarily follow that, over time, such decisions will wholly separate law from morality. Legal decisions need not always be moral in *how* they were decided, or in their ultimate result, in order for law to have a necessary connection to morality. This is because of the answer to the Primary Question, namely that law is the constant and consistent pursuit of what law ought to be, with the individual pursuits (i.e. the individual adjudications) being Pragmatic. Pragmatism requires the *re-deciding* of issues at future times; therefore, because the 2<sup>nd</sup>-dimension of law is characterized by Pragmatism, the 2<sup>nd</sup>-dimension recognizes that revisitation of previously decided legal issues will occur at future times. Eventually, various circumstances (legal, societal, political, economic, etc.) that may come to factor into a judge's second-order considerations may change so that the outcome of a later case more closely mirrors morality as compared to a previous case that decided the same or a similar legal issue.

Let's briefly revisit the segregation example one more time to prove the point. In *Plessy*, the justices at that time were faced with multiple first-order considerations and had to decide amongst these. In the end, the majority chose segregation even though this decision is generally not considered to be moral. In fact, the judges were likely of the view that the practicalities of segregation outweighed the principle that weighed in favour of more substantive equality, or at the time, the practicalities and principle coalesced such that the first-order consideration of segregation had the most weight after second-order considerations had taken place. A pragmatic decision was reached, and the doctrine of separate but equal was born (a doctrine that was eventually found to be lacking, especially in principle in later years). This is part of the nature of judicial decision making, it is a product of its times. But Pragmatism also calls for the revisitation of the legal issues over time. As such, in 1954, nearly 60 years after *Plessy* was decided, the United States Supreme Court decided to revisit the issue of segregation and equality in *Brown*. This time, a unanimous Court ended up overruling *Plessy* by choosing a first-order consideration pursuant to second-order considerations that had principle outweigh the practicalities. The example shows that revisitation is key.

The ultimate point is this: while the 2<sup>nd</sup>-dimension of law only concerns itself with one case at a time, one will notice that over all of time, law *writ large* is a culmination of the 'best' pragmatic legal decisions. As time progresses then, the law seemingly works towards remedying its deficiencies. Put another way, and as I will cover more fully in the next chapter, law works towards working itself pure. This is law's purification process. Law seemingly pursues perfection as it looks to move towards a better state of the law overall. In this way then, law can be seen as the constant and consistent pursuit of what law ought to be. And, it is this perpetual purification process (the constant and consistent pursuit of a better state of the law) that is moral

in and of itself. It necessarily connects law to morality (the other half of the Paradox). But in saying this, it must be remembered that the 2<sup>nd</sup>-dimension of law is only concerned with a single case of adjudication and not a string of such cases; therefore, the purification process and the constant and consistent pursuit is beyond the scope of the 2<sup>nd</sup>-dimension of law. One must therefore move on to a new dimension, the final dimension known as the 3<sup>rd</sup>-dimension of law, in order to more fully understand the nature of that process.

## Chapter 5: The 3<sup>rd</sup>-Dimension of Law – From the Beginning of Law to the Ever Changing Present Day

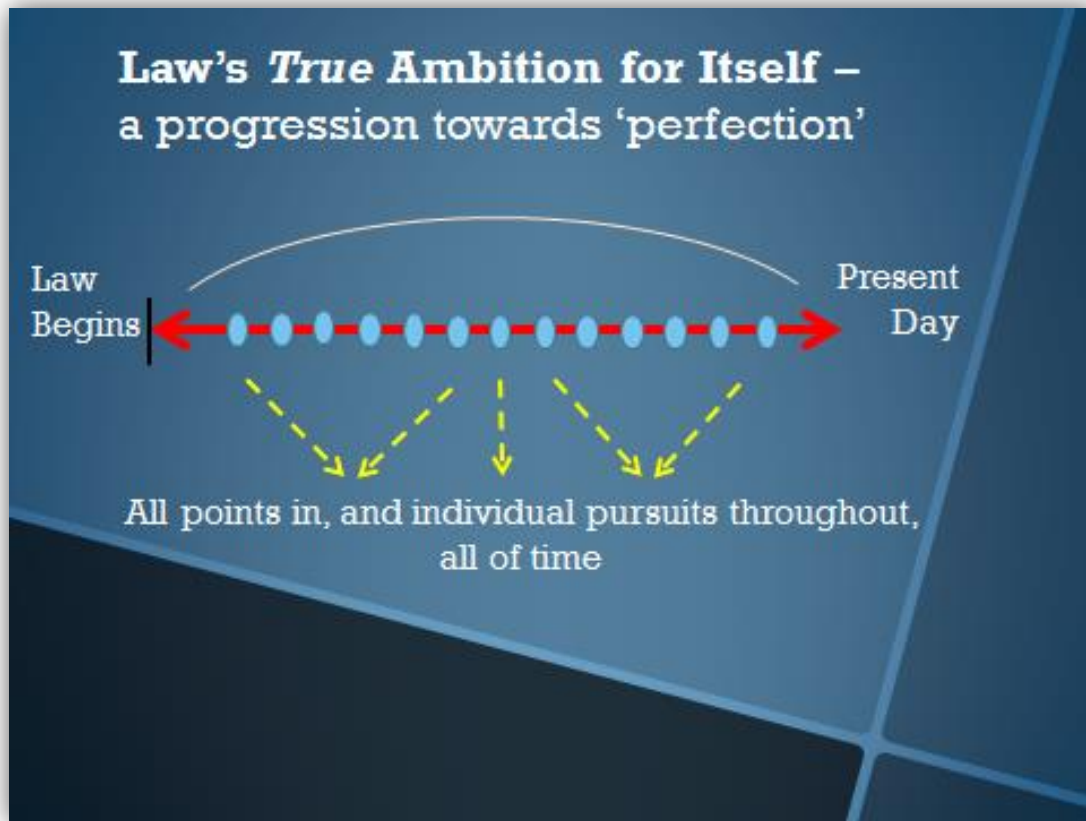


Fig 3

The 3<sup>rd</sup>-dimension of law is to be conceptualized as law as it exists from the very first point in legal time to the ever changing present day. I intend to argue that this dimension cannot be divorced from morality and that the vantage point of this dimension allows one to see that law is the constant and consistent pursuit of what law ought to be. It will thus follow that the Naturalist NCT holds true in this dimension. After beginning this chapter with a brief introduction to what the 3<sup>rd</sup>-dimension entails, I will further develop the dimension by addressing three fundamental concepts. Firstly, I will discuss what I mean by the law having a *true*



ambition for itself by working towards working itself pure. I will then discuss Fuller's morality of aspiration. And, finally, I will turn to discuss what shall be labelled the General Goal of legal systems. These discussions will be susceptible to various objections and, therefore, at the end of this chapter I will devote some time to addressing two of the more formidable objections.

### **5.1 What is the 3<sup>rd</sup>-Dimension of Law?**

The 3<sup>rd</sup>-dimension of law is, in essence, a diachronic view of law. It is the complete picture of law that is a step removed from the details of both the 1<sup>st</sup> and 2<sup>nd</sup> dimensions – it operates at a higher level of abstraction – and spans from what one can imagine as the beginning of law (or legal time) to the ever changing present day. It encompasses all of what may be called legal time. Recognition of a 'step back' is important, because it changes the data that is accessible to the individual, that is accessible from the vantage point of the 3<sup>rd</sup>-dimension. In other words, because one places oneself at a higher level of abstraction, the entire spectrum of law over time becomes available for viewing and the specific details of the other two dimensions become unavailable. It is from this higher level of abstraction, i.e. the 3<sup>rd</sup>-dimension of law, that one is able to observe that law, over time, works towards working itself pure, or in other words, works towards 'perfection' and that therefore law is the constant and consistent pursuit of what law ought to be. This will become known as law's *true* ambition for itself.

### **5.2 Understanding Law's *True* Ambition for Itself**

The 3<sup>rd</sup>-dimension of law has a theme: law has an ambition for itself, that ambition being to work towards working itself pure, with pure meaning wholly moral (or just). The idea that the law works itself pure is attributable to Lord Mansfield and his argument with respect to the

common law in *Omychund v. Barker*.<sup>217</sup> Lord Mansfield argued that “[A] statute very seldom can take in all cases, therefore the common law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.”<sup>218</sup> Now, although the idea of the common law being superior to statute has been completely rejected, the notion that the law works itself pure has redeemable merit. To harvest this merit, I will use the term not in the sense Lord Mansfield used it, but instead in relation to the 3<sup>rd</sup>-dimension of law.

Closer to my usage of this age old concept, is that explained by Dworkin. He called the idea ‘law’s ambition for itself’.<sup>219</sup> In *Law’s Empire*, Dworkin stated the following:

Sentimental lawyers cherish an old trope: they say that law works itself pure. The figure imagines two forms or stages of the same system of law, the nobler form latent in the less noble, the impure, the present law gradually transforming itself into its own purer ambition, haltingly, to be sure, with slides as well as gains, never worked finally pure, but better in each generation than the last. There is matter in this mysterious image, and it adds to both the complexity and the power of law...<sup>220</sup>

The notion builds upon the words of Lord Mansfield’s, being that the law works towards purity.

That said, it would be misleading of me if I did not point out that Dworkin himself was not a sentimental lawyer that cherished this old trope, but instead appeared to reject the idea that law can be made more pure.<sup>221</sup> Dworkin advanced an argument that the law as it stands is always in its most pure form if one accepts his notion of law as integrity, i.e. the Interpretive Thesis. As Chapter 4 demonstrated, however, this thesis is to be rejected, and thus I need not deal with this type of skepticism anymore here.<sup>222</sup> Instead, one might ask whether one should accept

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<sup>217</sup> (1744) 26 ER 15, 1 Atk at 23.

<sup>218</sup> *Ibid* [emphasis original].

<sup>219</sup> Dworkin-*Ambition* *supra* note 74; see also Dworkin-*Empire* *supra* note 73 at 400-07.

<sup>220</sup> Dworkin-*Empire* *supra* at 400.

<sup>221</sup> *Ibid*.

<sup>222</sup> I note that Dworkin’s argument that the law is already in its most pure state is dependent on a mythical creature of his own creation – Judge Hercules – that has super human capabilities. As Dworkin describes him, Judge

Dworkin's characterization of the classic phrase. I suggest one should, but only after a subtle change to the phrase is implemented, one that adds some emphasis. My claim, and the claim that I will defend throughout this chapter through an analysis of the 3<sup>rd</sup>-dimension of law, is that the law cannot work itself to the end of ultimate purity, or like Dworkin nicely summarized, the law can never work itself 'finally pure'. Therefore, my version of the claim takes the following form: law works *towards* working itself pure, with the emphasis here on the inability of the law to reach complete purity. The claim that law works towards working itself pure is what I shall call law's *true* ambition for itself. I acknowledge and highlight that the clarification is mainly a semantic one at this point as opposed to a substantive change in the classic concept itself, but it is a change that nevertheless helps to better frame the concept and clear it of some needless mystification.

Unfortunately, clarifying the semantic issue does not go far enough in explaining the claim itself. In fact, the claim raises many initial objections and additional questions that require attention and analysis. These questions are numerous and by no means easy to dismiss. What

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Hercules is "[a]n imaginary judge of superhuman intellectual power and patience..." – *ibid* at 239. Admittedly, with such a judge on staff in the courtroom of a nation, one could only assume that Dworkin's claim (i.e. that the law as it stands will always be in its purest form) would likely hold. After all, who am I as a mere mortal to even consider myself worthy of jostling with superhuman intellectual power and patience? Unfortunately for the claim however, no such judge exists in modern day society. Dworkin's claim is an ideal – it denotes a state of the law that is ultimately unattainable in real life. Therefore, in advancing a theory of law (including a theory of adjudication), I suggest we would be better served to adopt the more realistic notions of human fallibility and limitability as our foundation and then build upon the theory from there. I did just this in Chapter 4. The notions together hold that human beings are limited in capacity and fallible in both character and action and, as such, in considering a realistic ideal, humans will only be able to do their best in the situations that come before them. Humans will make mistakes, humans will err, and humans will be limited (in a variety of ways) in their ability to develop solutions to problem at any one specific point in time, both legal and otherwise. Therefore, the best humans can do as agents of the law is constantly and consistently pursue a better system of law. In other words, the best humans can do is work towards working the law pure through society's legal institutions. As humans do exactly this, the result is a system of law that seemingly works towards working itself pure, and as we have seen, this parallels the classic purity concept and can be rightfully labelled law's *true* ambition for itself. Now, I note that Dworkin has responded to similar objections by stating that the myth aspect of Judge Hercules matters not, for it is the use of Judge Hercules as a theoretical tool that elucidates "[t]he hidden structure" of adjudication. But again, and as Chapter 4 makes clear, this hidden structure is a false one and its falsity is ultimately perpetuated and exaggerated by the theoretical tool of choice.

does it mean for the law or a law to be pure? How is law to become pure? Can the law even be pure at all? What about evil or ‘wicked’ systems of law? Do such nefarious enterprises not undermine the very idea of purity in the law and/or a purification process within the law itself? Still others may object by arguing that to say the law works towards working itself pure is to commit to one end or to one conception of purity, but with numerous and incommensurable systems of law existing in the world, would such a committal not be illogical? Or to put it another way, is not the very notion of purity and purification incoherent from the outset of the argument? Put even more simply, is there only one conception of purity? Such questions and objections are important and I will be careful not to trivialize or dismiss them without proper analysis. As such, I shall devote this entire chapter to disentangling these issues. Through the clarifications, this chapter is aimed at substantiating both the claim that law works towards working itself pure, and the additional claim (also known as the solution to the Primary Question ‘what is law’) that law is the constant and consistent pursuit of what law ought to be.

### **5.3 Purity and the General Goal of Legal Systems**

Thus far it has been posited that law works towards working itself pure. What needs to be addressed then is what is meant by pure. A purified law is a law that is as it ought to be. It is a morally perfected law; a law that is what it ought to be in the moral sense. Therefore, a pure law is a law that is wholly moral and one that can be properly understood as ideal or existing in its ideal state. It is one that all reasonable persons would agree is as it ought to be, one that no legitimate claims of change to it can be made and, therefore, one that reasonable persons do not wish to change. As such, the point of purity exists when what ‘is’ coincides with what ‘ought to

be'. This reasoning underlies the solution to the Secondary Question that was outlined in the introduction to this project.

There may be different levels of perfection however and, therefore, different levels of purity within any one system of law and even within any one specific law. For example, few (anarchists notwithstanding) would argue that society is better off without a system of criminal laws. This is because having a system of criminal laws is for the overall moral good of any one society. Therefore, the idea of criminal laws, regardless of arguments for or against any specific criminal law, is wholly moral and, as a result, pure. Similarly, few would argue that there should not be any laws that prohibit rape. It matters not whether individuals disagree about what constitutes rape, it only matters that: 1) there is general agreement that there ought to be laws prohibiting rape;<sup>223</sup> and 2) there indeed exist laws that prohibit rape in some way. But having general perfection/purity does not lead to overall perfection/purity. Within each of these systems and others, individuals will disagree about which laws and which set of laws are for the moral good. These individuals will then move and act to change laws when they are deficient in whole or in part.<sup>224</sup>

Since individuals make attempts to change laws such that they may become more pure, i.e. they work towards working the law pure, it is implied, necessarily, that these individuals are

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<sup>223</sup> See Shapiro-*Legality* *supra* note 13 at 204-12 (Shapiro discusses a version of shared agreement with respect to Planning Thesis that he calls the Shared Agency Thesis. The latter holds that legal activity is a shared activity. Shapiro goes on to argue that every system has a master plan that is “[a] function of the substantive goals that designers intend to advance”, that being a product of shared agency).

<sup>224</sup> See *ibid* at 213-24 (In this section of *Legality*, Shapiro introduces his Moral Aim Thesis which holds that “The fundamental aim of legal activity is to remedy the moral deficiencies of the *circumstances* of legality.” [emphasis added]. Now, Shapiro claims that the aim of the law is to rectify moral deficiencies such that when communities face complex moral problems, planning is invoked and laws are implemented in furtherance of these plans. My claim is somewhat different. My claim is that individuals aim to remedy deficiencies in the laws themselves (i.e. in the plans). Whether or not the aim of all laws is to remedy moral problems in society is beyond the scope of this project and I take no stance either way. What I will say is that this latter claim is advanced by Shapiro and his defence of it is considerable).

working towards some general goal. To reason otherwise would be to suggest that individuals are implementing changes at random and therefore not working towards anything at all. Such, however, would be nonsensical since these individuals are implementing change for the reason of bringing about higher levels of purity. It follows that there must be some general goal for any system of law, a general goal that individuals seek to attain. From the vantage point of a higher level of abstraction, this goal may be seen as the pursuit of an ideal state of law and, as this goal is general to all legal systems, it may be labeled the General Goal. The goal is general and also, in a sense, common for it is shared amongst legal systems and provides the underlying reason for action with respect to the law for the individuals within those systems.<sup>225</sup>

The above discussion helps demonstrate the solution to the Primary Question, being that law is the constant and consistent pursuit of what law ought to be. In a legal system where individuals are constantly and consistently working to develop better laws and/or remedy deficiencies within existing laws, and where the judiciary is constantly and consistently choosing the best alternatives in disputes with respect to the law, the law naturally and incrementally works towards its pure and ideal state or, in other words, towards the General Goal. While at any one point in time the law may be closer to or further away from the General Goal, in relative terms, due to human fallibility and limitability, *it is the ambition towards perfection* that causes morality to pervade the law. This pervasiveness will be referred to later on as the ‘audacity of morality’ and helps explain why the law, when viewed *writ large* (i.e. through the 3<sup>rd</sup>-dimension of law) accords with the NCT and thus Naturalism.

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<sup>225</sup> This argument rings of the concept of practical reasoning about goals. Indeed, the idea is similar to Raz’s discussion of goals and personal well-being in *Raz-Morality supra* note 42 at 288-320. Raz discusses the idea with respect to individuals and how they have goals that provide reason for action so that they may attain those goals. While the idea is somewhat complicated due to the institutional nature of law, when one views the law from the 3<sup>rd</sup>-dimension of law, the General Goal may be extrapolated.

### 5.3.1 Fuller and the Morality of Aspiration

An interesting type of objection to the preceding discussion is, somewhat ironically, found in a work of the Naturalist Lon Fuller. In *The Morality of Law*, Fuller discusses two types of morality: the morality of duty and the morality of aspiration.<sup>226</sup> On the one hand, the morality of duty is more micro-focused, being a bottom-up concept that identifies what individuals must do at a basic level in order for there to be a functioning society.<sup>227</sup> The morality of aspiration, on the other hand, is macro-focused in nature, setting out a path towards an ultimate end. The 3<sup>rd</sup>-dimension of law is also macro-focused, taking into account all the various points in time throughout all of law. Therefore, my focus will be on the morality of aspiration, for its macro-focused view accords with that of the 3<sup>rd</sup>-dimension.

Fuller discusses ‘The Aspiration towards Perfection in Legality’ and argues that a perfect system of law (i.e. one where his eight principles of legality are perfectly realized) “[i]s not actually a useful target for guiding the impulse towards legality.”<sup>228</sup> He argues this is because the goal of perfection is much too complex to guide behaviour.<sup>229</sup> With respect, I disagree. Fuller’s view of the morality of aspiration is only half correct. On the one hand, it is true that we as human beings or as a society have aspirations, and that we may even have aspirations to reach some level of perfection or to be brought closer to perfection. On the other hand, and where Fuller seems to me to be misguided for he seems to miss (or reject) the implications of practical reason, is in his conclusion that despite these aspirations, they cannot successfully guide one’s conduct towards the conception of perfection due to complexity. It must be remembered that

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<sup>226</sup> See generally *supra* note 73 at 3-30 (Fuller notes that his recognition of these two types of morality is not unique, though his nomenclature is. Other writings that discuss similar issues include, among others: A.D. Lindsay, *The Two Moralities: Our Duty to God and to Society* (London, UK: Eyre & Spottiswoode, 1940), W.D. Lamont, *The Principles of Moral Judgement* (Oxford, UK: Clarendon Press, 1946), and Hart-CL *supra* note 7 at 180-84.

<sup>227</sup> *Ibid* at 5.

<sup>228</sup> *Ibid* at 41.

<sup>229</sup> *Ibid*.

much of the complexity that might exist in other dimensions is dulled by the generalization of the end aspiration made possible through the vantage point of the 3<sup>rd</sup>-dimension of law. It follows from this generalized aspiration that guidance is not only possible, but inevitable. This is because the generalized end aspiration, or the ultimate goal of perfection (i.e. the General Goal), provides reason for action.<sup>230</sup> These reasons, in turn, guide and influence one to act towards the pursuit of that goal, for those reasons act as a catalyst for the taking of actions that move one closer to that goal. It follows then that if a legal system was to have an ultimate goal (something now understood as true and being the General Goal), and if the agents of that system shared that goal (something again known to be true, for the General Goal is common to all legal systems) then that ultimate goal would likewise act as a reason for action for those individuals in the system. The General Goal then guides and influences the actions of the agents of a system in their pursuit of that General Goal.

#### **5.4 The Audacity of Morality: Why Law in the 3<sup>rd</sup>-Dimension of Law is Natural**

Through the 3<sup>rd</sup>-dimension of law, or in other words when the law is viewed *writ large*, law is the constant and consistent pursuit of what law ought to be. The 2<sup>nd</sup>-dimension of law consists of judges making the best choice possible in each individual case. The aggregate of these ‘best’ decisions, viewed from a higher level of abstraction, is an inevitable intertwining of law and morality due to law’s ambition of constantly and consistently moving towards its ideal state. It is morally right for a judge to do his/her best in making decisions, and also in making the best decisions in the circumstances of any one case, even if the result of that case is immoral. This point, I think, is reasonably uncontroversial. The more controversial issue is how one may

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<sup>230</sup> Cf Raz-*Morality* *supra* note 42 at 288-320.



claim that morality pervades the law when at any one point in time laws may exist as immoral (take, as an example, the segregation case of *Plessy* discussed in prior chapters). This issue, however, only arises when one fails to understand law's dimensional nature. While a system of law may never be what it perfectly ought to be, this actuality does not change the fact that law will always have a necessary connection to morality *in the 3<sup>rd</sup>-dimension of law*; this is the audacity of morality and why the law, when viewed *writ large*, conforms to the NCT.

Regardless of imperfections at any one point in time (remembering that these imperfections are only viewable from the vantage point of the 1<sup>st</sup>-dimension of law), and regardless of an inability to achieve absolute perfection, the law constantly and consistently moves towards perfection, and it is this movement and progression towards perfection that is moral in and of itself. The purification process is moral, and the 3<sup>rd</sup>-dimension provides one with the vantage point from which one may view that process. Ultimately then, because of the moral nature of the purification process, and the fact that the process is intrinsic to the 3<sup>rd</sup>-dimension of law, this dimension is inextricably linked to morality. This is the nature of law in the 3<sup>rd</sup>-dimension.

## **5.5 Objections to the 3<sup>rd</sup>-Dimension of Law and Law's *True* Ambition for Itself**

By this point, some may have developed certain objections to the notion that law has a true ambition for itself, and it will thus likely prove helpful to engage with some of the more formidable objections. The first is the problem of incommensurability or more specifically the notion of incommensurable legal systems. The second is the issue of 'wicked' systems of law. I will tackle each in turn.

### 5.5.1 The Objection of Incommensurable Legal Systems

Let's first address the issue of incommensurable legal systems. One may ask how the claim that law works towards working itself pure is tenable when there are a great variety of legal systems in the world that differ greatly in both form and substance. Such systems are sometimes said to be incommensurate or lacking a basis for comparison of value.<sup>231</sup> Admittedly, this objection appears at first glance to be rather difficult to overcome as empirical evidence seems to suggest that many of the legal systems in the world are so different that they are to be rendered incommensurable. Having said that, a sound reply to the objection is possible to develop, but in order to support the reply, I will need to revisit the work of Scott Shapiro and his book *Legality*.<sup>232</sup> In *Legality*, Shapiro argued for a theory of law as plans, and as was outlined in Chapter 1, his argument was based upon a deep foundation of philosophical and psychological research, with this research indicating the human beings are planning creatures by nature.<sup>233</sup>

#### 5.5.1.1 Human Beings as Planning Creatures – A Clarification

Shapiro, in referencing philosopher Michael Bratman, states that, “human beings have a special kind of psychology: we not only have desires to achieve complex goals, but we also have the capacity to settle on such goals and to organize our behavior over time and between persons to attain them.”<sup>234</sup> Shapiro's point is that human beings not only have the ability to plan and make plans, but that they have an inherent drive to plan, make plans, and adopt the same. This has important implications with respect to morality and the law, but before I go on to explain

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<sup>231</sup> See e.g. Raz-*Morality* *supra* note 42 at 321-366 (Raz discusses the notion of incommensurability as it pertains to values like freedom and equality. On Raz's definition, “A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.” [footnote omitted]).

<sup>232</sup> *Supra* note 13.

<sup>233</sup> *Ibid* at 119; see also Michael E Bratman, *Intention, Plans and Practical Reason* (Stanford, CA: Center for the Study of Language and Information, 1999).

<sup>234</sup> *Ibid*.

them, I feel it necessary to first qualify the concept slightly. It is important to keep in mind the degree by which individuals engage in planning behaviour. Planning occurs on a spectrum, beginning with a very limited ability or even inability to plan due to one's current circumstances, ranging to the ability to make multifaceted and diverse plans such as exist in more complex societies. Generally then, human beings are planning creatures to the extent they are free and able to plan. If stresses are placed upon humans to the point that they are only able to react, hence becoming reactionary creatures rather than planning creatures, then planning and one's abilities to plan will cease. For example, planning will cease in immediate emergency situations such as when one begins to slip on ice in one's car, or upon being almost to the point of complete dehydration and then stumbling upon water. In such circumstances, human beings revert to innate instinctual action as opposed to complex or even basic planning actions. Therefore, it is clearer to state that human beings are planning creatures if and only if they are free and able to engage in planning.

#### **5.5.1.1 Confronting the Objection**

With the clarification in mind, it follows that human beings that engage in more reactionary actions due to their circumstances will not plan to the extent of human beings whose circumstances are such that they are free and able to make plans. The former will rely more heavily on instincts as they may not be amongst an environment that wishes to foster more complex plans, while the latter will engage planning on a regular basis. So the degree by which humans plan, and the corresponding complexity of those plans, directly relates to the circumstances by which planning may evolve out of. What is important is that it is only at the point of planning that a legal system or a system of law can such be defined as one.

Now, as Shapiro's Planning Thesis demonstrates, when planning is engaged, legal systems begin, and also develop to the extent of the planning. These systems may then be compared in a variety of different ways based on those plans, the most notable for this project's purposes would be by evaluating the successfulness of the plans in attaining the General Goal. The General Goal, as was mentioned, remains the same for all legal systems. Therefore, even though the plans for each individual legal system may be incommensurate in the sense that their value has no basis for comparison with respect to other legal systems, at a more abstract level the systems indeed have a basis for comparison in the way by which, and the degree by which, those plans adhere to and attain the General Goal. It is in this way that one can say that one system of law is more just or less just than another; and in being able to compare value in this way, it follows that the objection of incommensurability, understood as a lack of comparability with respect to value, must fail.

### **5.5.2 The Objection of Wicked Legal Systems**

The second objection is an important one and takes the following form: is it not true that human beings have the capacity for evil, and if so, can human beings not create evil systems of law? Would these systems then not be the opposite of purity? And since human beings are planning creatures, can they not also plan for evil and/or create evil plans? Putting this altogether, is it not the case that simply because human beings are planning creatures by nature, that this fact cannot logically mean that human beings plan for the *good* by nature? Put another way, how can law work towards working itself pure, with a wholly pure system of law being one

that is wholly moral, when there have clearly been instances of evil or wicked systems<sup>235</sup> that were intrinsically immoral and the result of evil and wicked plans? These systems, after all, appear to manifest in a form that is anything but pure as I have argued pure to mean. Wicked systems are clearly evil and have potential to plunge deeper and deeper into evil, thus shocking our consciences. In fact, they may even be considered the exact antithesis of morality.

Although this objection, in its various forms, and upon first glance appears logically coherent and perhaps devastating to the 3<sup>rd</sup>-dimension of law, it is nevertheless misleading. There are multiple reasons for this, some internal to the wicked system and others more external. The internal tend to stem from the theory of law as plans, with the external tending to stem from the notion of hindsight. To help explain the responses, I will invoke a hypothetical example of a wicked legal system, using it as an analytical and comparative tool. But, before I go on to do so, I must stress that I do so delicately and with empathetic caution. I preface that which is about to be said with the following: it is beyond reasonable dispute that the actions and consequences of any one wicked legal system are in any way moral. In fact, these systems may only be seen as cruel and heinous, the likes of which have left deep scars on the face of humanity forever. As such, the responses to the objection of wicked legal systems that follow are in no way meant to be an attempt to justify the actions of such legal systems. It is simply a philosophical description of the realities of, and implications brought about by, wicked legal systems.

So, with the above caution always in mind, imagine a system of law where the individuals under that system are comprised of three distinct races. Suppose the system has laws

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<sup>235</sup> One of the leading books discussing the concept of a wicked legal systems is David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality*, 2nd ed, (New York, NY: Oxford University Press, 2010). Dyzenhaus takes as his object of study the legal order of apartheid in South Africa, generally considered to be a wicked legal system. He then advances an argument that the procedural naturalism of Fuller was actually substantive in nature and uses this to buttress the Validity Thesis.

that require the complete separation of each of the three races from each of the others, and that any co-mingling outside of government is to be punished by a period of extended torture followed by execution. Suppose further that two of the races join together to pass laws to the severe disadvantage of the third for the reason that doing so is for the overall good of the society; the consequence of such laws being that drastically inferior services are provided to that third race of people and that the third race is significantly marginalized. Clearly, such a system is monstrously wicked. That said, the heinous reasoning does not remove the underlying belief by the individuals in power that what they are doing is for the overall good of the society. In a perverted and twisted way, these individuals are working towards making a system of law that they believe is wholly just. Now, other individuals belonging to alternative legal systems may clearly (and rightly) disagree with this wicked system, criticize it, and learn from it, and this fits with an understanding of how the law works towards working itself pure, and with an understanding of how the law constantly and consistently pursues what it ought to be. These individuals may view the atrocities occurring within the wicked system and provide reasons as to why it is wicked and not in accordance with the General Goal of all legal systems. As a result, the individuals may influence their own legal systems to implement appropriate safeguards in order to protect their societies from falling victim to such atrocities. The individuals, as planning creatures, may use reasoned hindsight to progressively and persistently advance their systems of law into one that is more moral, i.e. more in line with the General Goal. This, ultimately, can be seen as a manifestation of law's true ambition for itself for it shows how the law goes about working towards working itself pure in a truly moral sense. In addition, the third race in that wicked system might provide criticism of the laws, arguing that they ought to be changed. It may be the case that upon increasing pressure from this race, and/or from other legal systems, the

political scheme may change such that the law as it is becomes changed to that which it ought to be. It may even result in the collapse of the wicked system altogether. Either way, the audacity of morality is still present as a result of the purification process going about its business.

The point is that reasoned individuals and planning creatures, i.e. human beings, will move themselves away from evil/wicked systems of law and the hardships and atrocities that are derived therefrom, or find ways to bring about change within that wicked system to extents possible. Generally, human beings will make attempts to learn from their mistakes and shortcomings and plan to create a better route forward. If the opposite were true, then human beings would be doomed to make the same mistakes over and over again, never correcting them, and our societies would never advance. Such an argument suggests that human beings do not find reasons for change, or if they do, cannot act on those reasons. Extrapolated from this argument would be perpetual, needless, and mass human suffering, without possibility of correction. However, and again, it is not general human nature (though it may be the nature of some humans) to wish and implement random suffering and hardship upon fellow humans, or to be wholly selfish such that indulgence in one's own pursuits would leave one blind to even minor consideration of others. Planning creatures through the direction of the General Goal, plan to achieve the good, plan to embolden morality, and plan to increase the state of morality within a society and a system of laws. When a plan fails, reasoned creatures learn from such failures and develop more sophisticated and morally supported plans as a result.

Ultimately then, as far as the 3<sup>rd</sup>-dimension of law is concerned, it does not matter whether a system of law at any one time is wicked because the planning nature of human beings is itself good. This good might manifest, again at times, as pure evil, but eventually reasoned creatures will look back upon such plans, or the plans of other reasoned creatures, and make

attempts to remedy the shortcomings, thereby removing the evil in such plans. In the same way, individuals within a legal system will look back upon the consequences of their laws or the laws of others and then argue for remedies to the deficiencies within the laws. Therefore, human beings in being agents of the law assist in working the law pure. To put in generally then, it stands to reason that a perverted conception of the good does not pollute the notion that individuals both inside and outside of any one system are still attempting to pursue the good, and that such attempts are moral in nature. And, it follows from this that the objection of wicked legal systems must fail .

## **5.6 Conclusion**

This chapter has consisted of a discussion of the 3<sup>rd</sup>-dimension of law, which is law as it exists from the very first point in legal time to the ever changing present day. It was shown that law has a true ambition for itself, being that it works towards working itself pure in the moral sense. To do so, individuals analyze what the law is, and then by identifying deficiencies, reason that the law ought to be changed. The process of changing law as it ought to be into law that is was called the purification process and demonstrated why the Primary Question ‘what is law’ has the solution that law is the constant and consistent pursuit of what law ought to be. This purification process also underlies the solution to the Secondary Question, which asked ‘what is the relationship between law as it is and law as it ought to be’. Finally, this chapter also provided an answer to the Tertiary Question (does law have a necessary connection to morality?), which is ‘yes’. This answer demonstrates one half of the Paradox, being that law does have a necessary connection to morality. Combined with the other half, which as remembered from Chapter 3 is that in the 1<sup>st</sup>-dimension of law, law does not have a necessary



connection to morality, the Paradox is made complete. As was mentioned in the introduction, the solution to the Paradox is the theory of law as dimensions. Now that this theory has been canvassed, the solution is apparent: law both does and does not have a necessary connection to morality because law exists in three separate dimensions and, depending on the dimension that one chooses to view the law through, one's answer to the Tertiary Question will change. This is the nature of law in 3-dimensions.

## CONCLUSION

Having now delved into the foray of theoretical dispute through a theory of law as dimensions, the merits of my theory, like the merits of others before mine, are up for dispute. It is surely not in doubt, or at least I would not be so foolish to claim, that my theory is safe from critique. It is inevitable that the blows that I have ventured to volley, and/or the ideas that I have proffered, will be fitting of proper and poignant critique. I do hope, however, that such critique will move the discipline of legal theory closer towards a unified theory of law, for it is attaining a unified theory that I believe achieves a true account of the nature of law. I do admit however, and of course, that this is somewhat putting the cart before the horse, and thus that ambition must be deferred to a different project to be undertaken on a different day. For now, it will be fitting to briefly summarize what has been examined over the course this project.

This project began with the positing of three questions, i.e. the Primary Question, the Secondary Question, and the Tertiary Question. Each question was then given a preliminary solution. I then went on to explain the fundamentals of legal theory and how the three questions came to be. In doing so, I laid out the fundamentals of Positivism, Naturalism, and Pragmatism, and noted some of the contentions between them. I then turned to establish the fundamentals of a theory of law as dimensions, explaining the usefulness in leaning on other fields of study and the importance of the basic elements of time to the theory of law as dimensions. This discussion established a foundation for a discussion of law in 3-dimensions. I thus turned to this discussion beginning with the 1<sup>st</sup>-dimension of law and how the fundamental theses of Positivism coalesced with the intrinsic properties of that dimension. My analysis revealed that in the 1<sup>st</sup>-dimension of law, law exists as social and historical fact and that there is no necessary connection between law and morality. This meant that the Tertiary Question, as viewed through the 1<sup>st</sup>-dimension of law,

had to be answered ‘no’, for again law had no necessary connection to morality in this dimension. I then turned to discuss the 2<sup>nd</sup>-dimension of law and the nature of judicial adjudication. My analysis in this regard demonstrated that due to the nature of legal reasoning and the existence of legal binds, judges decide cases through Pragmatism. It followed that Pragmatism coalesced with the intrinsic properties of the 2<sup>nd</sup>-dimension of law. Finally, I turned to discuss the 3<sup>rd</sup>-dimension of law where it was revealed that due to the General Goal of legal systems and practical reasoning, the Primary Question ‘what is law’ had to be answered with: law is the constant and consistent pursuit of what law ought to be. My analysis also revealed that law as viewed through the 3<sup>rd</sup>-dimension of law is necessarily connected to morality and that therefore the fundamental theses of Naturalism coalesced with this dimension. In considering the whole of the project, it was ultimately the case that the solutions to the three questions posited in the introduction were confirmed.

But, admittedly, my analysis did not answer every possible question, nor could have it. For example, one may still wonder what happens if there comes a time where it can no longer be the case that law is the constant and consistent pursuit of what law ought to be. What if, from a higher level of abstraction the General Goal is called into question or begins to appear to be false? Take for example the following hypothetical. Suppose that tomorrow an alien race makes contact with Earth. Suppose also that the alien race decides to impose ‘law’ that is devoid of any moral content and is actually designed to eradicate the human race. Suppose further that the aliens are not imposing such laws *because* they are of the belief that the imposition of such laws is best for their own race in the long run, but instead are ambivalent as to whether it benefits them or not. Suppose even further that human beings here on earth are of the view that the alien laws are wholly just and thus do not find a need to argue that the laws ought to be changed

(perhaps they are unable to comprehend that the laws will eventually eradicate them). It may be argued in such a case that law cannot be said to be the constant and consistent pursuit of what law ought to be, for any concept of ought is moot. In such a case then, would the alien 'law' be valid law? Would it not be law at all for it would violate the Validity Thesis? Would it not be law for it potentially violates the Sources Thesis? Would it be law, but existing within a 4<sup>th</sup>-dimension?

While the above hypotheticals, questions, and concerns are interesting, they will need to be left to another project for another day. Notwithstanding the potential merit in such issues, this project was concerned with providing a foundation for, and defense of, a theory of law as dimensions. Many of the implications that might result from this theory have been left untested; however, in truth, they must be left to unravel over time, for a testing of such is again beyond the scope of this project. So for now, as it appears as though I have accomplished that which I set out to do, it is suitable for this project to come to a close. And so it shall be closed.

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## APPENDIX

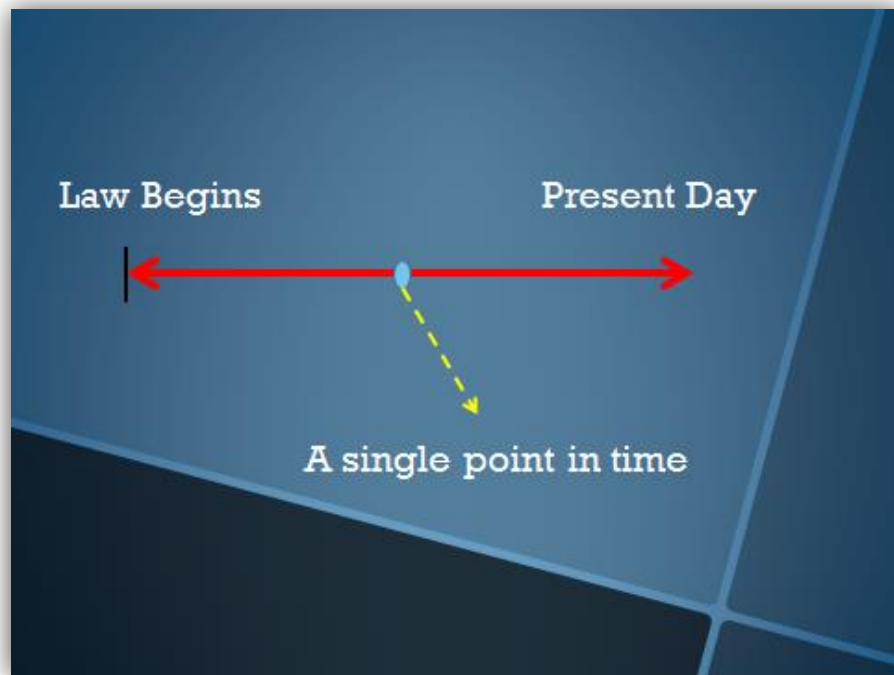


Fig 1

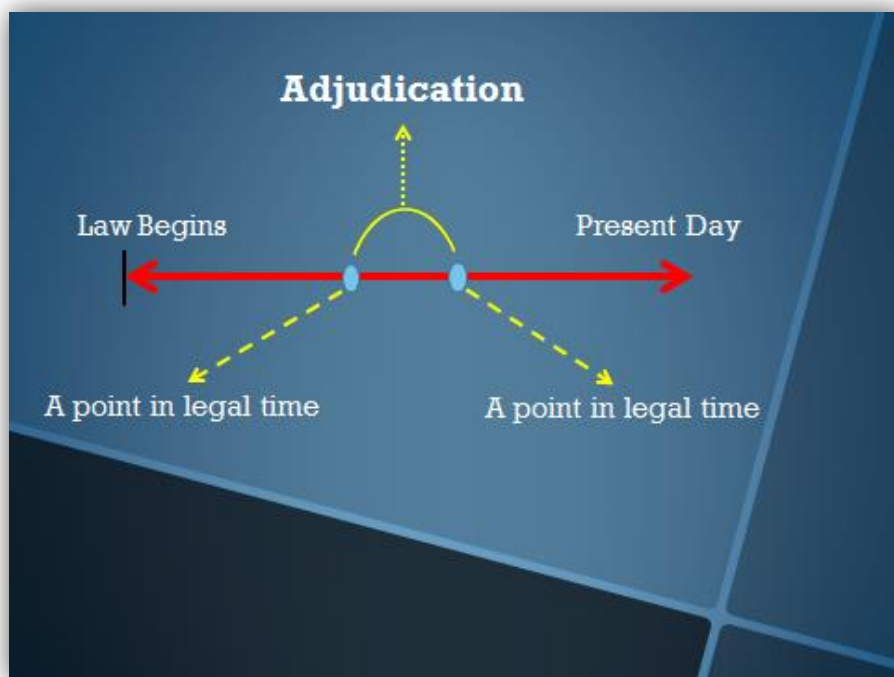


Fig 2

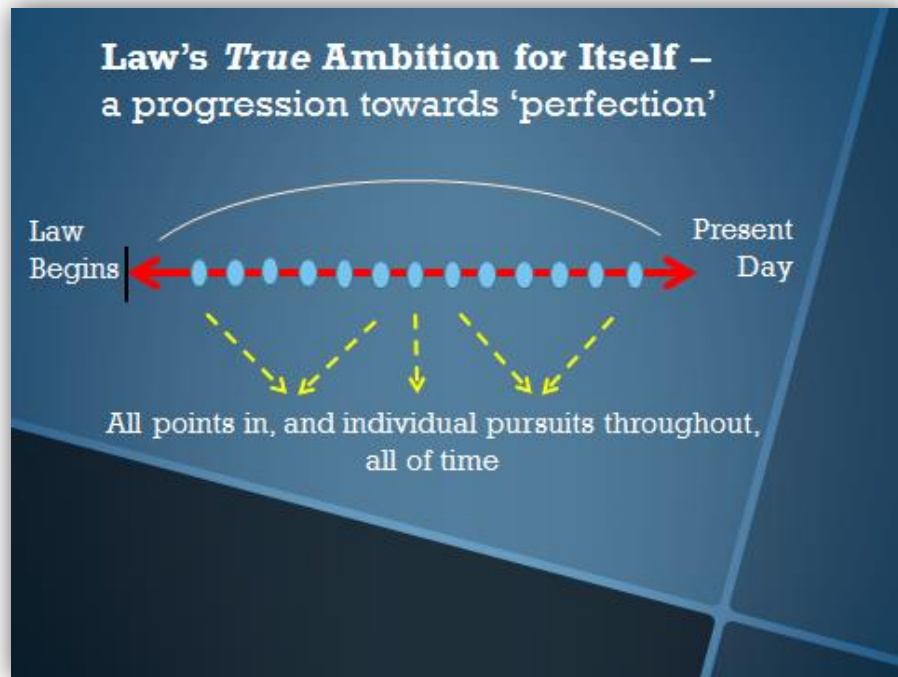


Fig 3